Supreme Court, U.S.
FILED
98 349 AUG 25 1998
OFFICE OF THE

No. _____

In The
Supreme Court of The United States
October Term 1997

PHILIP MANGLITZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

CLARKE F. AHLERS*
Attorney at Law
Atholton Square
10450 Shaker Drive, Suite 111
Columbia, Maryland 21046
(410) 740-1444

Attorney for Petitioner
**Counsel of Record*

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

250

Questions Presented for Review

1. Was the District Court's cautionary instruction sufficient to provide the Petitioner due process of law when evidence previously judged inadmissible on the basis that it would excite the jury to irrational behavior was intentionally put before the jury?

2. Was the District Court's cautionary instruction sufficient to provide due process of law where a Prosecutor commented upon the Petitioner "not taking the stand" in closing argument?

3. Does the accusatory process have requisite fairness and integrity where a Prosecutor's remarks and conduct misled a Grand Jury about material facts?

4. Does the accusatory and trial process have requisite fairness and integrity where Brady material is suppressed until mid-trial?

Parties

The Petitioner is Mr. Philip Manglitz. Mr. Manglitz was accused, indicted, and thereafter convicted by a jury in the United States District Court for the District of Maryland, the Honorable Herbert N. Maletz, presiding. The conviction was upheld on direct appeal to the United States Court of Appeals for the Fourth Circuit. The Petitioner seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit.

The respondent is the United States of America.

Table of Contents

Questions Presented i
Parties ii
Table of Contents iii
Table of Authorities iv
Official and Unofficial Reports and Opinions vii
Jurisdiction of the Court viii
Constitutional Provisions ix
Statement of the Case 1
Argument 9
Conclusion 18
Appendices

Table of Authorities

CASES:

Brady v. Maryland,
373 U.S. 83 (1963) ..... *passim*
Giglio v. United States,
405 U.S. 150 (1972) 15, 16
Griffin v. California,
380 U.S. 609 (1965) 12
Helton v. United States,
221 F.2d 338 (5th Cir. 1955) 10
Kyles v. Whitley,
514 U.S. 419 (1995) 14
Marshall v. United States,
360 U. S. 310 (1959) 14
United States v. Al-Mudarris,
695 F.2d 1182 (9th Cir. 1983) 14
United States v. Asdrubal-Herrera,
470 F.Supp. 939 (N.D. Ill. 1979) 14
United States v. Basurto,
497 F.2d 781 (9th Cir. 1974) 14
United States v. Claiborne,
765 F.2d 784 (9th Cir. 1985) 14
United States v. Console,
13 F.3d 641 (3d Cir. 1993) 14
United States v. Daniels,
770 F.2d 1111 (D.C. Cir. 1985) 10

United States v. Dow,
457 F.2d 246 (7th Cir. 1972) 10
United States v. Harrison,
716 F.2d 1050 (4th Cir. 1984) 16
United States v. Hernandez,
975 F.2d 1035 (4th Cir. 1992) 3, 4
United States v. Jacangelo,
281 F.2d 574 (3rd Cir. 1960) 10
United States v. Mechanik,
475 U.S. 66 (1986) 14
United States v. Omni Int. Co.,
634 F. Supp. 1414 (D. Md. 1986) 16
United States v. Payner,
447 U.S. 727 (1980) 16
United States v. Rinaldi,
301 F.2d 576 (2nd Cir. 1962) 10
United States v. Sawyer,
469 F.2d 450 (2nd Cir. 1972) 10
United States v. Smith Grading & Paving, Inc.,
760 F.2d 527 (4th Cir. 1985) 15
United States v. Tomaiolo,
249 F.2d 683 (2nd Cir. 1957) 10
United States v. Williams,
504 U.S. 36 (1992) 14
United States v. Williams,
10 F.3d 1070 (4th Cir. 1993) 15

United States v. Woods,
544 F.2d 242 (6th Cir. 1976) 14

STATUTES:

18 U.S.C. § 982(b)(1)(A) 1
18 U.S.C. § 1956(h) 1
18 U.S.C. § 1957 ..... 1, 9
18 U.S.C. § 3231 2
18 U.S.C. § 3500 (Jencks Act) 6, 7
18 U.S.C. § 3742 viii
21 U.S.C. § 841 1
21 U.S.C. § 846 1
28 U.S.C. § 1254 viii
28 U.S.C. § 1291 viii

UNITED STATES CONSTITUTION:

U.S. Const., Art. 3, Section 2 viii
U.S. Const., Amend. V ix

FEDERAL RULES OF EVIDENCE:

Federal Rule of Evidence 403 ..... 3, 4
Federal Rule of Evidence 404(b) 2, 3, 8, 9, 10

Official and Unofficial Reports and Opinion

This case was originally assigned to United States District Judge Frederic N. Smalkin. Judge Smalkin considered pretrial motions of the Petitioner, and issued a Memorandum Opinion and Order of the Court on January 25, 1996. This pre-trial Memorandum Opinion and Order of the Court is appended hereto. (Apdx B - 169).

At the conclusion of the trial, the Petitioner filed a Motion for New Trial. Honorable Herbert N. Maletz, United States District Judge, Sitting by Designation, entered a Memorandum and Order appended hereto. (Apdx B - 38).

Following a conviction on some counts of the indictment, the Petitioner filed a direct appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the conviction on April 28, 1998. The Opinion is appended hereto. (Apdx A - 1).

Jurisdiction of the Court

The judgment of the United States District Court for the District of Maryland was entered on September 19, 1996. The Petitioner noted a direct appeal.

The United States Court of Appeals for the Fourth Circuit issued its Opinion on April 28, 1998 affirming the United States District Court for the District of Maryland. (Apdx A - 1).

The Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on May 12, 1998. The Petition is appended hereto. (Apdx A - 23).

The United States Court of Appeals for the Fourth Circuit issued an Order Denying the Rehearing on May 27, 1998. The Order of the Court of Appeals is appended hereto. (Apdx A - 36).

The United States Court of Appeals for the Fourth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The United States Supreme Court has appellate jurisdiction pursuant to the United States Constitution, Art. 3, Section 2 and 28 U.S.C. § 1254.

Constitutional Provisions

U.S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

A United States Grand Jury was convened on July 27, 1995, for the purpose of taking evidence in the matter of United States of America v. Philip Manglitz. Following a Grand Jury presentment, Mr. Philip Manglitz, the Petitioner, was indicted on a nine count indictment alleging conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846, possession with intent to distribute marijuana in violation of 21 U.S.C. § 841, conspiracy to launder money in violation of 18 U.S.C. § 1956(h), and six counts of money laundering in violation of 18 U.S.C. § 1957(a). In the indictment, the Government sought forfeiture of $797,500 in currency as well as real property described in Count 6 of the indictment, or substitute assets pursuant to 18 U.S.C. § 982(b)(1)(A), for a total value of $992,500.

During the Grand Jury presentment, a Grand Juror questioned why the only evidence that the Petitioner had ever received any cash was the word of the informants. The Prosecutor and DEA Agent both knew that no currency was found during an extensive search of the Petitioner's residence, and that there were no known instances of the Petitioner spending any unusual amounts of cash. Nevertheless, the Prosecutor communicated to the Grand Jury that the witness DEA Agent knew far more than he was saying:

GRAND JUROR: So, you're aware Manglitz has

all this cash and somehow he's managed to get rid of --

AUSA: Let the record reflect the special agent is smiling.

(Lodged with the Clerk at time of filing)

The Prosecutor and DEA Agent then vouched for the memory, and by extension, the credibility of the informant. (Lodged with the Clerk at time filing).

After return of the indictment, the United States District Court was the court of original subject matter jurisdiction by authority of 18 U.S.C. § 3231.

The case was originally assigned to the Honorable Frederic N. Smalkin, United States District Judge. Because the Petitioner has allegedly committed prior uncharged bad acts, as well as prior charged misconduct, and because the Petitioner made reference to these prior acts during tape recorded conversations, much of the evidentiary wrangling in the case at trial involved the introduction of evidence under Federal Rule of Evidence 404(b) and the reference made to such evidence in the closing argument of the Prosecutor.

The 404(b) evidence related to the Petitioner's arrest and conviction for drug importation twenty-three years before the instant case. The Petitioner filed a Motion to Exclude Extrinsic Act Evidence. (Apdx B - 99). Accordingly, Judge Smalkin issued a Memorandum Opinion and Order granting

in part, and denying in part, the Petitioner's motion. (Apdx B - 169). Specifically, Judge Smalkin found that because the Government did not intend to introduce evidence of the conviction itself, the Petitioner's motion was moot. See Memorandum Opinion and Order, n 1. (Apdx B - 169). Judge Smalkin further admonished the Prosecutor generally about the 404(b) evidence.

> The Court notes, however, that extrinsic evidence regarding Mr. Manglitz's alleged drug trafficking activities in the 1970's and early 1980's and evidence regarding real-estate transactions that Mr. Manglitz allegedly conducted with drug proceeds in the 1970's is "'tenuous and remote in time from the charges in the indictment.'" United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). The Court, therefore, will not entertain any specific evidence regarding Mr. Manglitz's activities in the 1970's and early 1980's. This case will not be sidetracked by trying events that occurred twenty years ago. See Federal Rule of Evidence 403. With respect to general evidence of Mr. Manglitz's alleged past drug trafficking and money laundering, the Court will carefully examine the use for which such evidence is offered. Hernandez, 975 F.2d at 1040. The government is admonished to present its case with these principles in mind.

(Apdx B - 175)(emphasis in original). Judge Smalkin specifically considered a taped conversation in which the Petitioner discussed with the informant the fact that in the 1970's he was caught with fifty pounds of marijuana near the Texas-Mexican border.

> These two passages [related to the marijuana at the border] are inadmissible under Federal Rule of Evidence 403, because the probative value of such evidence is substantially outweighed by the danger of unfair prejudice.
>
> In this case, the probative value of such specific evidence regarding Mr. Manglitz's arrest for 50 pounds of marijuana and his subsequent sentence for the crime is slight. Although the evidence demonstrates that Mr. Manglitz has knowledge of marijuana trafficking, the evidence is "tenuous and remote in time from the charges in the indictment." United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). *The risk that the jury will be excited to irrational behavior by such specific evidence of Mr. Manglitz's past drug trafficking activities is disproportionate to the probative value of such evidence.*

(Apdx B - 179)(emphasis added).

On another matter, prior to trial the Petitioner sought

discovery, including Brady material. (Apdx B - 71-83, 84-93, 94-96). The requests for Brady material went essentially unanswered. In October, 1995, the Petitioner filed a pretrial motion seeking the production of Brady material. (Apdx B - 62). In his Order denying the motion, Judge Smalkin stated that the "Motion for Production of Brady Material [is] denied because the prosecution in this District well knows its Brady obligations . . . ." (Apdx B - 97).

Prior to trial, Judge Smalkin removed himself from the case, and the case was reassigned to the Honorable Herbert N. Maletz, Senior United States District Judge. A jury trial was commenced on June 3, 1996 in the United States District Court for the District of Maryland. The trial continued from day to day through and including June 25, 1996.

During trial, and in spite of the admonition of the trial Court, the Prosecutor intentionally elicited testimony about the decades old arrest:

AUSA: Did he say anything about the marijuana business?

[INFORMANT]: Yes.

Q What did he say about it?

A That he had been in the business at one time.

Q What else did he tell you about the marijuana business?

A Well, he had been arrested down on the Texas-Mexican

--

(Apdx B - 203). The Petitioner's objection was sustained. Id. Thereafter, the Petitioner made a motion for mistrial. (Apdx B - 203-204). The motion for mistrial was made on the basis of the improper question and prejudicial answer. Id. The Court denied the motion.

A short time later the Court addressed counsel and admitted that the Court had not heard the witness's answer. (Apdx B - 205). The Court asked the court reporter to read the transcript, and sua sponte, again denied the motion for mistrial and directed that he would give the jury a cautionary instruction. (Apdx B - 206). The Court made a finding that the question was improper and that the answer was totally inappropriate and prejudicial. (Apdx B - 208). Accordingly, the Court warned the jury to disregard the evidence. Id.

Also during trial, highly exculpatory written records of statements made by another informant were discovered by the Court in its ex parte review of reports of Government interviews for Jencks material. (Lodged with the Clerk at the time of filing). The Court ordered the Government to turn the statements over to the defense, as Brady material. (Apdx B -

196). The trial Court noted that there was significant delay in turning over this Brady material. (Apdx B - 196-197).

It was during a trial disclosure of Jencks materials, that defense counsel was provided with the offensive Grand Jury transcript, quoted heretofore. Because this transcript was not provided before trial, there existed no intelligent way to critically evaluate the conduct of the Grand Jury, or to complain about the Prosecutor's conduct.

The Petitioner also avers that during rebuttal closing argument, comments made by the Prosecutor resulted in another cautionary instruction by the Court. Judge Maletz necessarily instructed the jury that "no inference whatsoever may be drawn from the fact that Mr. Manglitz did not take the stand and testify." (Apdx B - 219). The Prosecutor then immediately emphasized exactly that which the Court had cautioned against.

> AUSA: Thank you very much, Your Honor. I did not mean to suggest that in any way, ladies and gentlemen. The government's burden here is a very heavy one, extremely heavy. The government must prove its case beyond a reasonable doubt but, we accept that burden. We accept it everyday. We come in here to prove things to you, beyond a reasonable doubt, with evidence. With evidence. And that is what I ask you to do, ladies and gentlemen, look at the evidence. Use your common sense and look at the evidence. And we have met that burden. I don't mean

to suggest anything else to you about the defendant not taking the stand.

(Apdx B - 220)(emphasis added).

Furthermore, the trial was manifest with other error. The Petitioner's Brief of Appellant in the Court of Appeals complains of four acts of misconduct by the Prosecutor before the Grand Jury, two acts of misconduct regarding pre-trial disclosure, two acts of misconduct in putting impermissible 404(b) evidence related to drug trafficking with arrest and drug trafficking without arrest before the jury, two acts of misconduct related to improper evidence of witness tampering, one act of misconduct related to two separate instances of alleged bank fraud, four acts of miscellaneous misconduct, two instances of misrepresentation of witness testimony, and four additional acts of misconduct related to closing argument, including two references to the Petitioner's election to remain silent. Most of the errors occurred during only eight days of trial testimony.

The Petitioner was convicted of Count 1 (conspiracy to possess with intent to distribute marijuana), Count 3 (conspiracy to launder money) and Counts 5, 7, 8, and 9 (each of which is a money laundering count). The Petitioner was acquitted of Count 2 (possession with intent to distribute marijuana). The jury could not reach a verdict on Counts 4 and 6, which were dismissed upon motion of the United States.

The Court permitted a separate final argument and separate jury deliberation on the issue of forfeiture. The jury found that $255,000 in United States currency was involved in or was traceable to money laundering violations under 18 U.S.C. § 1957 as charged in Counts 5, 7, 8 and 9. A sentencing hearing was held on September 6, 1996. The Petitioner was sentenced to a term of 108 months as to Count 1, and 108 months as to each of the remaining counts, to run concurrent with that imposed in Count 1, as well as certain standard conditions to apply upon release. The Court imposed an assessment of $300, a fine of $25,000, and certain other standard conditions. On September 18, 1996, the Court entered a Preliminary Order of Forfeiture in the amount of $255,000.

Argument

Admission of Improper 404(b) Evidence

In its Opinion, the United States Court of Appeals for the Fourth Circuit found that the Prosecutor "went too far in questioning [an informant witness]." (Apdx A - 10). "The prosecutor knew that the evidence about [Petitioner's] history had been specifically excluded by the judge." (Apdx A - 10). Nevertheless, the Court of Appeals reasoned that the improper questioning was not so prejudicial as to mandate a reversal. Id. The Court of Appeals reasoned that the trial Court gave a curative instruction which proved sufficient to preserve the integrity of the trial in the face of the Prosecutor's improper questioning.

Ordinarily, improper introduction of evidence of a defendant's past criminal record is ground for a new trial; cautionary instructions will not cure the error. Marshall v. United States, 360 U. S. 310 (1959); United States v. Rinaldi, 301 F.2d 576 (2nd Cir. 1962); United States v. Jacangelo, 281 F.2d 574 (3rd Cir. 1960); United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957); Helton v. United States, 221 F.2d 338 (5th Cir. 1955).

In this case the quantum of prejudice by improper introduction of 404(b) evidence was evaluated before trial. It was not found to be minimal prejudice where a cautionary instruction may suffice. See United States v. Sawyer, 469 F.2d 450 (2nd Cir. 1972)(Prejudice from improper questions alone was minimal). The prejudice was determined to be so great that "the jury [would] be excited to irrational behavior." (Apdx B - 180). This type of prejudice can not be removed by a cautionary instruction. See United States v. Dow, 457 F.2d 246 (7th Cir. 1972)(Extensive and serious damage could not be undone by a cautionary jury instruction).

It is a fiction that highly prejudicial evidence improperly admitted at trial is cured by an instruction from the Court. The harm was done, the Court cannot "un-ring the bell" or remove the drop of ink from the glass of milk. See United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985). Moreover, the harm was particularly great because the jury learned of the highly prejudicial information (a prior narcotics trafficking arrest) without learning that it had

occurred 23 years before the instant case.

Improper Comment on
Petitioner's Election Not to Testify

The Court of Appeals also errs in its analysis of the Prosecutor's closing argument. The Court reasoned:

> The prosecutor continued his argument by agreeing with the judge's [strong curative] instruction and emphasizing that the government had the burden to prove its case beyond a reasonable doubt. 'And we have met that burden. I don't mean to suggest anything *else* to you about the defendant not taking the stand.' . . . While we agree that the word [else] might have been better left unsaid, we are not convinced by Manglitz's argument that this one word demonstrates deliberate misconduct by the prosecutor. Rather, the circumstances indicate that it was a slip of the tongue.

(Apdx A - 19-20).

The Prosecutor's wholly unnecessary statement was impermissible commentary on the Petitioner's election not to testify. The Prosecutor's argument is that the jury may consider the Petitioner's silence in evaluating whether the Government has met its burden of persuasion. The proof of that is found by simple logic: What does the Prosecutor mean to suggest by the Petitioner's not taking the stand? What is the

permissible argument to which the Prosecutor is referring?

A defense objection was interposed. Because the Prosecutor solemnized "the silence of the accused into evidence against him," the argument was totally improper. Griffin v. California, 380 U.S. 609, 614 (1965). In Griffin, this Court held that the United States Constitution "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 615.

The District Judge, in order to rule on the objection, asked the Prosecutor to repeat his argument in the presence of the jury.

> THE COURT: Would you, please, I am sorry, repeat your last few sentences.
>
> AUSA: I am was just carrying on, Your Honor.
>
> THE COURT: Repeat what you just said. I don't want to emphasize it but I have an objection.
>
> AUSA: I don't want to suggest anything to you about Mr. Manglitz not taking the stand. I did not suggest that and I will not suggest that to you.

(Apdx B - 220).

The Prosecutor misstated his prior argument to the Court. In doing so, he materially changed its meaning. The

Prosecutor left out the word "else," which was emphasized in his initial statement to the jury. Furthermore, he added an entire sentence which was not stated to the jury. Id.

The Prosecutor's original remarks clearly communicated that there was a permissible relationship between the Government's burden of proof and the Petitioner's election not to testify. When asked by the Court to restate the testimony, the Prosecutor repeated a different statement. From a Machiavellian point of view, this makes perfect sense. The Prosecutor was well aware that he was seeking to persuade two very different audiences: the Prosecutor sought to persuade the jury of the guilt of the Petitioner and the Prosecutor sought to persuade the Court that he was "in bounds."

Perhaps for this reason, not even the Prosecutor argued in the Brief of Appellee to the United States Court of Appeals that the statement was a "slip of the tongue." Rather, on appeal the Prosecutor argued the statement to be legally permissible. It was the Court of Appeals that labeled the comment a slip of the tongue and, having made an evidentiary finding not supported by any facts in the record, found that the closing argument, taken as a whole, did not meet the standard of impropriety and prejudice required to reverse a conviction on the grounds of prosecutorial misconduct.

Grand Jury Argument

Counsel is aware that federal courts have no authority to require that federal prosecutors present exculpatory

evidence to grand juries. United States v. Williams, 504 U.S. 36 (1992). In addition, a presumption of regularity attaches to grand jury proceedings. United States v. Claiborne, 765 F.2d 784, 791 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); see United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976)(defendant bears burden of demonstrating misconduct due to presumption of regularity), cert. denied, 429 U.S. 1062 (1977).

The facts in this case demonstrate grand jury abuse. The Prosecutor intentionally misled the grand jury, by fashioning an examination and presenting testimony to the grand jury as true, when the Prosecutor knew it to be untrue. United States v. Asdrubal-Herrera, 470 F.Supp. 939, 941 (N.D. Ill. 1979). A prosecutor may not present to a grand jury evidence which he or she knows to be false or misleading. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). Nor may a prosecutor deprive a grand jury of the opportunity to evaluate the credibility of a witness. United States v. Al-Mudarris, 695 F.2d 1182, 1187-88 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

A supervening jury verdict of guilt establishes that any error in the grand jury proceeding was harmless. United States v. Mechanik, 475 U.S. 66 (1986); United States v. Console, 13 F.3d 641, 670 (3d Cir. 1993), cert. denied 511 U.S. 1076 (1994). Of course, if the guilty verdict itself is the product of prosecutorial misconduct, or other trial error, the guilty verdict should not reasonably stand to bar the

examination of alleged grand jury abuse.

Brady Argument

The prosecutor deprived Mr. Manglitz of a fair trial by the full use of Brady, and Giglio materials.

> Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (citations omitted).

Kyles v. Whitley, 514 U.S. 419 (1995). "Brady requires material information to be turned over to the defense prior to trial. United States v. Williams, 10 F.3d 1070, 1076 (4th Cir. 1993), cert. denied, 513 U.S. 926 (1994).

Had the Petitioner received the statement in advance of trial, the statement would have served as the basis for investigating and exploiting this exculpatory evidence. See United States v. Smith Grading & Paving, Inc., 760 F.2d 527 (4th Cir.), cert. denied, 474 U.S. 1005 (1985). Reference to exculpatory statements by trial witnesses turned informants would have been made during opening statement.

Where a prosecutor flagrantly disregards his obligations under Brady, confidence in the integrity of the trial process, and outcome of the trial, are compromised and undermined. See Kyles, 514 U.S. 419.

In addition, the Fourth Circuit previously recognized

that:

> in cases of prosecutorial misconduct, the due process clause should not always be the touchstone of whether reversal is appropriate. This court has inherent supervisory power to hold government prosecutors to a higher standard of conduct than required by the due process clause where necessary to ensure the fair administration of justice and to safeguard judicial integrity.

United States v. Harrison, 716 F.2d 1050, 1053 n. 1 (generally referring to improper comment and citing United States v. Payner, 447 U.S. 727 (1980)); see also United States v. Omni Int. Co., 634 F. Supp. 1414, 1436-40 (D. Md. 1986) (dismissing indictment under court's supervisory powers).

Absent some sanction for failing to timely provide Brady and Giglio material, the rational prosecutor intentionally withholds information so that an accused cannot exploit the evidence by discovery of other exculpatory and corroborating evidence, and by reference to the evidence in his opening statement. The production of Brady material made away from the jury during trial does not convey that the Government failed to live up to the ethical obligations of prosecution; it conveys that the accused (or his attorneys) were ill prepared to defend the lawsuit. Moreover, the rational prosecutor could literally wager that not all Brady material will ever be discovered, or even if discovered, cause

an appellate Court to conclude that the information would ordinarily lead to a different verdict. The flaw in our system is the pronouncement of an obligation, without any penalty for non-compliance. This is antagonistic to the fair administration of justice.

Conclusion

The United States Court of Appeals for the Fourth Circuit erred in its judgment that the cautionary instruction cured the harm of inadmissible and highly prejudicial circumstances regarding a prior arrest which predated the trial by more than two decades. The Court of Appeals also erred in permitting the Prosecutor to comment upon the Petitioner "not taking the stand" during rebuttal closing argument. For these reasons, the Petition for Writ of Certiorari should be granted.

At such time as this Court reaches those issues for review, the Court should also exercise its discretion and grant certiorari on the issue of fairness of the Grand Jury process, and the suppression of Brady materials by the Government.

Respectfully submitted,

Clarke F. Ahlers
Atholton Square
10450 Shaker Drive, Suite 111
Columbia, Maryland 21046
(410) 740-1444

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP MANGLITZ,
Defendant-Appellant.

No. 96-4761

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP MANGLITZ,
Defendant-Appellant.

No. 96-4762

Appeals from the United States District Court
for the District of Maryland, at Baltimore.

Herbert N. Maletz, Senior Judge, sitting by designation.
(CR-95-314-S)

Argued: January 30, 1998
Decided: April 28, 1998

Before WILLIAMS and MICHAEL, Circuit Judges, and KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Clarke Francis Ahlers, Columbia, Maryland, for Appellant. Richard Charles Kay, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Philip Manglitz was convicted in district court on several charges relating to money laundering and drug (marijuana) trafficking. He appeals his conviction, arguing mainly that the prosecutor engaged in improper conduct that deprived him of a fair trial. He also argues that the district court erred in using the drug conspiracy guideline instead of the money laundering guideline in setting the sentence for his drug conspiracy conviction. For the reasons that follow, we affirm his conviction and sentence.

I.

Randolph Ayersman and Dana Kleberg were part of a marijuana importation and distribution ring. The marijuana was harvested in Mexico, imported into California, and then transported to Ayersman in Maryland. Ayersman would consign the marijuana to Kleberg, who would supply it to other dealers. Part of the proceeds from the marijuana sales journeyed back through the same conduit, mainly in bundles of $5,000 placed in brown paper bags. This operation generated large cash profits for Kleberg and Ayersman, which they sought to launder.

The defendant in this case, Philip Manglitz,

volunteered his services and that of his real estate company, Carman Associates, to launder cash for the two marijuana traffickers. Manglitz would sell plots of land in Howard County, Maryland, to Ayersman and Kleberg in exchange for cash payments from the profits of the drug trafficking operation. Manglitz would then misrepresent the sale price of the land on the sales contracts at far below the amount Ayersman and Kleberg paid. This way, Ayersman and Kleberg would turn their drug trafficking profits into "legitimate" real estate investments, and Manglitz and his partner, Ronald Carter, would pocket the excess cash. Since Manglitz handled the money in these transactions, Carter did not know the source of the money.

Ayersman was arrested by federal agents, and he and Kleberg began to cooperate with the government. Kleberg taped several conversations with Manglitz, in which Manglitz made several incriminating statements. The testimony of Ayersman, Kleberg and other cooperating witnesses placed Manglitz at the heart of the money laundering scheme, with Manglitz receiving $5,000 bundles of cash in brown paper bags from Ayersman and Kleberg.

On July 27, 1995, Manglitz was indicted for conspiracy to distribute marijuana and money laundering. Prior to trial Judge Smalkin granted a motion in limine under Fed. R. Evid. 404(b) precluding the government from introducing certain evidence of prior criminal acts by Manglitz. This evidence included Manglitz's 1972 drug

importation conviction and the specifics of his history in the marijuana trade in the 1970s and early 1980s. Thereafter, the case was assigned to Judge Maletz for trial. Judge Maletz confirmed the prior evidentiary rulings and further ruled that evidence suggesting that Manglitz threatened witnesses with physical violence was inadmissible under Fed. R. Evid. 403.

On June 20, 1996, the jury convicted Manglitz of conspiracy to distribute marijuana, 21 U.S.C. § 846, conspiracy to launder money, 18 U.S.C. § 1956(h), money laundering, 18 U.S.C.§ 1957(a), and aiding and abetting, 18 U.S.C. § 2. At sentencing Manglitz argued that the applicable guideline was § 2S1.1, which concerns money laundering, instead of § 2D1.1, which concerns drug distribution. The court disagreed and sentenced him to 108 months of imprisonment. Manglitz now appeals.

II.

A defendant must satisfy a two-part test to bring about the reversal of his conviction for prosecutorial misconduct. Specifically, the defendant must show that the prosecutor's conduct was (1) improper and (2) "prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial." United States v. Wilson, 135 F.3d 291, 297 (4th Cir. 1998) (citations and internal quotations omitted); United States v. Harrison, 716 F.2d 1050, 1053 (4th Cir. 1983).

Manglitz claims that there were several instances

where the prosecutor engaged in misconduct requiring reversal. He first argues that the prosecutor acted improperly by withholding exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500. He further contends that the prosecutor deliberately flouted the trial court's evidentiary rulings and elicited inadmissible testimony from witnesses during the trial. Finally, Manglitz alleges that the prosecutor's closing argument discussed excluded evidence and impermissibly commented on his silence during trial. We examine each of these arguments in light of the legal standard for prosecutorial misconduct.

A.

Manglitz first argues that the prosecution failed to provide him written records concerning his partner, Carter. These records contained notes from Carter's initial statements to federal investigators, in which Carter suggested that Manglitz received the large amounts of cash in question from the sale of farm equipment rather than money laundering. This evidence was not turned over to Manglitz until the judge discovered it by chance while reviewing government reports of witness interviews for a different purpose during trial. Manglitz argues that by not handing these notes over to him, the prosecutor acted improperly in violation of Brady v. Maryland, 373 U.S. 83 (1963), which requires the

government to disclose to the defense any exculpatory information.

There is no question that this material was exculpatory or that the prosecution was obligated to turn it over. This does not automatically mean that Manglitz's rights under Brady were violated, however. Belated disclosure of Brady material is a constitutional violation only if the defendant was unable to make effective use of the exculpatory material initially kept from him. See United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 532 n.6 (4th Cir. 1985). Here, the information was disclosed to Manglitz before Carter testified. Manglitz therefore had a full opportunity to prepare for and execute an effective cross examination based on that material. Indeed, the only prejudice Manglitz can claim is that he would have cited the allegedly exculpatory evidence in his opening statement. However, because Manglitz was able to make effective use of the material in cross-examination, he was not unduly prejudiced by his inability to cite it in his opening statement. Since there was no Brady violation in the end, there was no prosecutorial misconduct that warrants reversal.

Similarly, Manglitz alleges that the prosecutor failed to disclose handwritten notes made by federal agents when they interviewed Ayersman. The trial judge found that this material should have been disclosed under the Jencks Act, 18 U.S.C. § 3500. The Act requires that statements made by a government witness must be turned over to the defense after

the direct examination of that witness at trial. Just prior to Ayersman's testimony, the judge ordered the production of the agents' handwritten notes of Ayersman's statements to them. Although the government objected, arguing that a typed copy of the notes had already been produced, the judge did not rescind the order for production.

As with the Brady material, these notes were turned over to Manglitz in time for him to review them before cross-examining Ayersman. This is in literal compliance with the Jencks Act's requirement that such material be provided after the direct testimony of the witness. Furthermore, the handwritten notes were duplicative of the typed statements previously received by the defense. Because the legal requirements of the Act were complied with, and because Manglitz was able to use the material at the appropriate time, there was no conduct by the prosecutor that requires reversal.

B.

Manglitz also points to the prosecutor's tactics in his examination of certain witnesses as further evidence of misconduct. Specifically, Manglitz argues that the prosecutor deliberately framed his questions to elicit evidence that had been excluded by the court's order. The first instance concerns evidence that Manglitz had been active in the drug trade in the late 1970s and early 1980s and that he had been convicted for importing marijuana in 1972. Before the trial

began, Judge Smalkin had excluded this evidence, saying that these prior bad acts were too remote in time to be probative in Manglitz's impending trial. During the trial, the prosecutor elicited the following testimony from Kleberg:

> Q Did [Manglitz] say thing about the marijuana business?
> A Yes.
> Q What did he say about it?
> A That he had been in the business at one time.
> Q What else did he tell you about the marijuana business?
> A Well, he had been arrested down on the Texas-Mexican
> --

Judge Maletz halted the testimony immediately. After consulting with counsel, the judge issued the following curative instruction:

> THE COURT: Now the jury may remember the testimony of this witness about a conversation he had with Mr. Manglitz aboard a plane on route from Acapulco back to the United States. At one point, you may recall, Mr. Kay made the following inquiry: And what else did he say? I sustained an objection.

> Now do members of the jury recall what this witness's answer was before I sustained the objection? Well, that answer was totally inappropriate. It will be totally disregarded. The witness should not have answered in view of the fact an objection was pending.
>
> I will repeat, the question was improper, the answer was not only improper it was prejudicial and shall be disregarded in toto as though you had never heard it.

The prosecutor knew that the evidence about Manglitz's history had been specifically excluded by the judge. He also should have known that by pressing this line of inquiry he ran a considerable risk of violating Judge Smalkin's earlier ruling. We therefore agree with Manglitz that the prosecutor went too far in questioning Kleberg. However, we disagree with Manglitz that the testimony elicited in the improper questioning was so prejudicial as to mandate a reversal.

One of the factors which we must consider in evaluating prejudice is whether the trial court issued a curative instruction. A curative instruction can prevent an otherwise prejudicial comment from misleading the jury. See United States v. Loayza, 107 F.3d 257, 262 (4th Cir. 1997). Here, the judge gave a very strong instruction admonishing the jurors to disregard the testimony. The judge moved

quickly and decisively, and we think his action was sufficient to preserve the integrity of the trial in the face of the prosecutor's improper questioning. Accordingly, we find no prejudice here.

Similarly, Manglitz argues that the prosecutor acted improperly by eliciting other testimony about Manglitz's past as a drug trafficker. Judge Maletz had ruled before trial that the government could produce testimony from James Lee about his money laundering scheme with Manglitz in the 1970s. Specifically, Lee could testify that Manglitz had sold land to him in exchange for cash from drug proceeds. The court further ruled that any testimony by Lee about Manglitz's direct involvement in marijuana trafficking (as opposed to money laundering) would be excluded. When he examined Lee at the trial, the prosecutor first asked him if he had ever purchased property from Manglitz. Lee described how he had purchased land from Manglitz using $50,000 in cash from drug proceeds. The prosecutor then asked why Lee had given the drug money to Manglitz. Lee responded: "It was because of my partner was doing a drug deal in Miami." Again, the trial judge immediately stopped this line of questioning. Manglitz argues that this question and answer violated the judge's pretrial ruling against presenting evidence about Manglitz's drug trafficking activities.

We disagree. The jury only heard that Lee had an unidentified partner doing a drug deal in Miami. This was consistent with the trial judge's ruling that Lee, in testifying

about laundering money through Manglitz, could say that he (Lee) used drug proceeds to buy land from Manglitz. Lee's isolated answer that referred to his unnamed drug partner, without more, could not be read to suggest that Manglitz had been a drug trafficker in the past. We do not see how the prosecutor's question, which led to the one sentence answer by Lee, amounted to improper conduct by the prosecutor.

Finally, Manglitz contends that the prosecutor tried to introduce excluded evidence that Kleberg feared physical harm from Manglitz. Before trial, Judge Maletz considered a motion from Manglitz to exclude a letter by Kleberg memorializing a conversation he had with Ayersman. The letter indicates that Ayersman warned Kleberg to fear Manglitz and intimated that Manglitz had murdered his own brother.[1] The judge ruled that this evidence was inadmissible as unduly prejudicial under Fed. R. Evid. 403.

In Manglitz's cross-examination of Kleberg at trial, Kleberg was asked when he first mentioned Manglitz's name to federal investigators. The following exchange ensued:

> Q Well, the area of questioning by [DEA agent] Forletta at the first meeting with you where the name Mr. Manglitz came up was an area of questioning involving your assets, is that correct?
> A No, it wasn't.

---

[1]This allegation is otherwise unsubstantiated in the record.

Q What was the topic?
A My personal safety?
Q Oh, your safety?
A Yes.
Q You were scared for your safety?
A Yes.
Q You are the guy with all the guns, right?
A I was afraid for my personal safety.
. . .
Q And so you said to the DEA I am scared of certain people, is that correct?
A That is correct.
Q I see. So naturally the DEA took interest in the people you were scared of, is that correct?
A That is correct.

As a result of this testimony, the judge instructed the prosecutor to tell Kleberg "to make no reference whatsoever to any violence or threat by Mr. Manglitz" during redirect. During his questioning of Kleberg on redirect, the prosecutor asked him: "You testified on cross-examination that you were concerned about personal safety, do you recall that?" The judge halted the proceedings and criticized the prosecutor at the bench for asking the question. The judge then instructed the jury to draw no inference from the question. Manglitz urges that this question constituted prosecutorial misconduct.

The judge's pretrial ruling was clear that no reference

was to be made at trial to the Kleberg letter documenting the conversation between Ayersman and Kleberg. Manglitz, however, cross-examined Kleberg on a different topic: the circumstances under which Manglitz's name came up in a meeting between Kleberg and federal agents. The judge's pretrial ruling did not cover the meeting between Kleberg and federal agents, and Manglitz opened the door by cross-examining Kleberg about this meeting. The judge nevertheless admonished the prosecutor just before Kleberg's redirect examination to make sure that Kleberg did not refer to "any violence or threat" made by Manglitz. This admonition did not appear to bar the prosecutor from asking Kleberg on redirect about his cross-examination testimony concerning his meeting with federal agents. Kleberg had testified under cross-examination that he first mentioned Manglitz's name to the agents in connection with Kleberg's concern for his own personal safety. On redirect, the prosecutor referred to Kleberg's testimony about the meeting with federal agents by asking if he remembered testifying that he had been concerned about personal safety during the meeting. When the judge stopped the prosecutor, the prosecutor said he expected Kleberg to reply to this question by simply stating what he had already indicated on cross-examination, that he was afraid of Manglitz. The prosecutor also told the judge that Kleberg's testimony would not have referred to "violence or threats" by Manglitz. We need not decide whether the prosecutor violated the judge's

admonition.

Even if the prosecutor's question was improper, Manglitz can show no prejudice from it. Among the factors we must consider in evaluating prejudice from prosecutorial impropriety is the degree to which the conduct would mislead the jury and whether there was a curative instruction by the court. See Loayza, 107 F.3d at 262-63. Here, the prosecutor's question was prompted by Manglitz's cross-examination of Kleberg. Moreover, all that the jury heard was the prosecutor asking a question that restated Kleberg's earlier testimony as elicited by Manglitz. Furthermore, the judge issued a very strong curative instruction immediately after the question was asked. When we consider the question and the judge's prompt curative instruction together, we do not see any prejudice.[2]

C.

Manglitz also charges that the prosecutor made improper remarks to the jury in his closing. Specifically, he argues that the prosecutor improperly accused him of bribing witnesses and impermissibly commented on the fact that

---

[2]Manglitz also asserts that a question to Carter by the prosecutor implied that Manglitz had committed bank fraud. Because the judge struck the testimony and directed the prosecutor to make no use of it during his closing argument, we find no prejudice.

Manglitz exercised his right not to testify. We disagree.[3]

1.

In a closing argument, a prosecutor may argue that the evidence gives rise to an inference, so long as that inference can be reasonably drawn. See Wilson, 135 F.3d at 298. He may not press the inference so far that the facts do not support it, however. See id.

Manglitz contends that the prosecutor misrepresented the evidence by arguing that Manglitz offered a bribe to Kleberg in exchange for his silence. These statements were based on a taped conversation between Manglitz and Kleberg made before Manglitz's arrest. Manglitz stated on tape that "if you guys come through stand up guys, right, and you don't roll over, I'm gonna bend over backwards to help you do whatever you wanna do." Manglitz offered to send Kleberg money in the unlikely event that Kleberg went to jail. He then discussed how valuable it was to a prisoner to receive money from people outside the prison:

> You can buy sneakers while you're in there when your sneakers wear out. All sorts of things, so- sh--, this guy up in Hagerstown

---

[3]Manglitz also argues that the prosecutor misrepresented the testimony of Cooper, Forest, Lee and Kleberg. Because we do not find anything improper in the prosecutor's characterization of that testimony, we reject Manglitz's claims.

was even telling me he can buy a t.v., I sent him a thousand bucks. . . .

-

Years ago when, when he went down for, for a couple keys of coke, and ah, I sent him money for a t.v., He was top dog in there you know. If you got money to draw, most of the guys that go in there have gotten wiped out of everything. They don't got a pot to p--- in . .

Id. Subsequent testimony revealed that Lee, Manglitz's partner in laundering drug money in the 1980s, was the prisoner in Hagerstown to whom Manglitz sent the money, although Lee denied that he had any understanding with Manglitz.

From this evidence, the prosecutor argued that Manglitz was offering to pay Kleberg and Ayersman if they went to prison in exchange for their silence. This seems a reasonable inference from the evidence in the record. While Lee denied that he had an understanding with Manglitz, Manglitz told the story to Kleberg in such a way as to allow a reasonable inference that he had. In any event, the prosecutor was arguing that Manglitz had tried to bribe Kleberg. This was a fair argument, particularly in light of Manglitz's statement that he would "bend over backwards" if Kleberg would not "roll over." We conclude that the prosecutor did not act improperly in making this argument.

Manglitz also contends that the prosecutor in his rebuttal argument impermissibly commented on Manglitz's refusal to testify. A statement by the prosecutor is improper if it is manifestly intended to be, or would naturally and necessarily be taken to be, a comment on the defendant's failure to testify. See United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973), aff'd sub nom. Anderson v. United States, 417 U.S. 211 (1974). The statement Manglitz complains of referred to an aborted transaction on February 28, 1995, in which Manglitz refused to accept a cash payment from Kleberg while being taped. In his closing argument, Manglitz invited the government to explain why Manglitz did not take the cash. In reply, the prosecutor noted that Manglitz first looked at the cash and appeared ready to accept it before having a sudden change of heart when he entered Jack Cooper's office to close the deal. "What happened when they got to Mr. Cooper's office? . . . Who knows? Only one person knows. Only one person in the world who knows and that is Philip Manglitz, he knows." The prosecutor went on to state the inference that Manglitz suspected that Carter was taping the conversation. At this point the judge court admonished the jury not to draw any conclusion from the fact that Manglitz did not take the stand.

We find that the statement about what was in Manglitz's mind during the aborted transaction was invited by

the defense. When the defense does something to invite an allegedly improper comment by the prosecutor, that weighs against the prejudicial nature of the comment. See United States v. Harrison, 716 F.2d 1050, 1053 (4th Cir. 1983). Here, the defense challenged the prosecutor to explain what caused Manglitz to decline the cash offered by Kleberg in that meeting. The prosecutor was merely drawing reasonable inferences from the evidence in order to answer the question. In so doing, he merely noted that only Manglitz knew what he was thinking at that time. This is similar to a case where a prosecutor argues that a witness's testimony was uncontradicted, even though the only other person who could contradict that testimony was the accused. We have repeatedly found that tactic to be proper. See United States v. Francis, 82 F.3d 77, 78 (4th Cir. 1996). Even if the prosecutor's statement here was improper, the judge issued a strong curative instruction which avoided any prejudice to Manglitz as a result of it. Cf. Loayza, 107 F.3d at 262.

The prosecutor continued his argument by agreeing with the judge's instruction and emphasizing that the government had the burden to prove its case beyond a reasonable doubt. "And we have met that burden. I don't mean to suggest anything else to you about the defendant not taking the stand." After a defense objection, and the judge's suggestion that the prosecutor restate the sentence, the prosecutor modified his statement: "I don't want to suggest anything to you about Mr. Manglitz not taking the stand."

Manglitz contends that the prosecutor's first follow-up statement was improper because of the word "else." He argues that by using this word the prosecutor implied that it was appropriate for the jury to take Manglitz's failure to testify into account in considering whether the government met its burden. While we agree that the word might have been better left unsaid, we are not convinced by Manglitz's argument that this one word demonstrates deliberate misconduct by the prosecutor. Rather, the circumstances indicate that it was a slip of the tongue. As a result, we do not think the prosecutor's first formulation (using"else") was manifestly intended to comment on Manglitz's silence. See Anderson, 481 F.2d at 701. Furthermore, the prosecutor had just emphasized the government's exacting burden of proof. We do not see how adding the word "else" could be taken to suggest that the burden was somehow lessened by Manglitz's silence. At any rate, the prosecutor corrected his statement immediately and made it abundantly clear that the jury could draw no conclusion from Manglitz not taking the stand. This, combined with the court's instruction given a minute or so earlier, is enough to neutralize any possible prejudice to Manglitz.

Taken as a whole, therefore, we conclude that the prosecutor's closing argument did not meet the standard of impropriety and prejudice required to reverse a conviction on

the grounds of prosecutorial misconduct.[4]

III.

Manglitz also argues that the district judge erred in applying the Sentencing Guidelines. He claims that because his conviction stems from the fact that he laundered money for a marijuana distribution ring, he should be sentenced under the money laundering guideline instead of the drug conspiracy guideline. We disagree.

Manglitz was convicted of violating 21 U.S.C. § 846, conspiracy to distribute marijuana. The Guidelines provide that the sentence for a conviction derives from the section "most applicable to the offense of conviction." § 1B1.2(a). Application Note 1 to this section points to the statutory index included in Appendix A for guidance. That index clearly indicates that the appropriate guideline for sentencing under 21 U.S.C. § 846 is § 2D1.1, "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy." We are bound to follow the commentary of the

---

[4]Manglitz presses the further argument that the prosecutor behaved improperly in the grand jury proceedings by misrepresenting the evidence. But a guilty verdict in a jury trial renders any error before a grand jury harmless. See United States v. Mechanik, 475 U.S. 66 (1986). Because we affirm Manglitz's conviction, we reject his grand jury claim.

sentencing guidelines as authoritative. See Stinson v. United States, 508 U.S. 36 (1993). Since the guidelines clearly indicate that the conduct of Manglitz's conviction, conspiracy to distribute marijuana, is covered by § 2D1.1, the judge did not err in applying that guideline.

Manglitz's conviction and sentence are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-4761 No. 96-4762

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
PHILIP MANGLITZ,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Honorable Herbert N. Maletz, Senior Judge, sitting by designation)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF COUNSEL

Counsel requests this Honorable Court rehear the appeal in this case because material legal and factual matters were overlooked or misapprehended in the decision rendered by this Court. Fed. R. App. P. 40 (a); Local Rule 40 (b).

Alternatively, counsel suggests a hearing or rehearing en banc. Fed. R. App. P. 35 (a). In its Opinion, the Court of Appeals has made errs in its understanding of the facts, apparently accepting as true statements of fact presented as true by the Government in its Brief of Appellee but discredited by the Defendant-Appellant in the Reply Brief by reference to the trial transcript and Joint Appendix. Moreover, by its Opinion the Court has excused cumulative prosecutorial misconduct which resulted in a denial of due process of law for the Defendant-Appellant, Philip Manglitz.

JUDICIAL HISTORY

On April 28, 1998, a panel of this Court, in an unpublished per curiam opinion, affirmed the District Court. United States v. Philip Manglitz, Nos. 96-4761, 96-4762, 1998 WL 205806 (4th Cir. Apr. 28, 1998). This Petition for Rehearing and Suggestion for Rehearing En Banc has followed.

ARGUMENT

I. INTRODUCTION

The Court's per curiam opinion misstates material facts established at the District Court trial. The factual error is basic, for it is against misstated material facts that the Court dismisses as harmless repeated prosecutorial misconduct. In

its opinion, the Court of Appeals did not address other instances of prosecutorial misconduct in the Brief of Appellant. The Court of Appeals did not address the legal issue of cumulative prosecutorial misconduct.

As the panel will recall, during oral argument, one member of the panel characterized the Prosecutor's conduct as "skating too close to the edge." In its Opinion, the Court of Appeals made an affirmative factual and legal finding that the Prosecutor violated the Constitutional requirements of Brady as well as Judge Smalkin's pre-trial evidence ruling, but found the intentional prosecutor to be without prejudice to Mr. Manglitz. The ruling by the court of Appeals is silent with respect to that which is implied by the boldness of Brady violations: that the integrity of the prosecution itself cannot be trusted. The ruling by the Court of Appeals also belies the pretrial finding by Judge Smalkin that introduction of the excluded evidence would be so highly prejudicial that it would excite the jury to irrational conduct.

Unfortunately, the Court of Appeals Opinion confirms that far from too close to the edge, the Prosecutor a rational if offensive, decision to intentionally violate the trial court's Order and to win a conviction at all costs in a close trial. (Please recall that the trial resulted in a verdict of conviction of some counts, acquittal on the major drug count, and a hung jury on several other counts.) In this case, the Prosecutor acted to misrepresent material facts to the Grand Jury which indicted Mr. Manglitz, acted to hide Brady material from the

defense attorneys and the accused until after the trial had begun, and presented evidence patently excluded by the trial court, without penalty or consequence.

FACTUAL OVERSIGHT BY THE COURT OF APPEALS

Preliminarily, the Court of Appeals asserts as fact that Philip Manglitz volunteered his services to launder drug money. In fact, there is no evidence that Philip Manglitz volunteered his services and that of a real estate company in which he was a partner, Carman Associates, to launder cash for the two marijuana traffickers. Ironically, and in contradistinction, this case turned on the idea of willful blindness. All of this is made clear in the extensive statement of facts set forth in the Brief of Appellant, and adopted herein by reference.

When considering the facts of this case, it is important to recall that none of the facts set forth in the Brief of Appellant were contested by the Government in its Brief of Appellee. However, the Government's "Statement of Facts" in its Brief of Appellee was replete with error and misrepresentation. The errors and misrepresentations of the Government are well documented in the Appellants Reply Brief.

One brief representative example of this Court's misapprehension of the facts is found at page 3 of the Opinion. "Since Manglitz handled the money in these

transactions, Carter did not know source of the money." This misunderstanding most probably emanates from the Government's Brief of Appellee where the Government misled the Court of Appeals by stating that Ayersman gave money to Ron Carter "at the defendant's direction." As the Transcript makes clear, Ayersman gave the money directly to Carter, who put the money in the trunk of his Cadillac. (Tr. 266-67). The Government cites no authority for it's proposition that this was done at Mr. Manglitz's direction. (See generally Reply Brief of Appellant, 1-6).

It is important to recall that pretrial investigation, including the execution of a search and seizure warrant, netted no cash in any house, office, safe, vault, bank or account associated with Philip Manglitz. (See J.A. 412-13). Mr. Manglitz was not known to possess or spend any cash, with some meaningless exceptions. (See generally Trial Transcript; Tr. 538-39, 877). When offered a large amount of cash by Kleberg in a tape recorded sting crafted by the DEA, Mr. Manglitz is heard to query the source of the cash, and then decline accepting the cash when Kleberg cannot describe a lawful source. (J.A. 462-63). (On this issue, the transcript of the transaction makes clear that an inaudible statement by Mr. Manglitz was the question of whether Mr. Kleberg brought the check to the meeting.) It was Mr. Carter found with approximately $45,000 in cash, stored in safes and safe deposit boxes. (Tr. 1219). Moreover, Carter denied that he ever received cash from Mr. Manglitz when interviewed by

Government agents. (This Brady material was not disclosed by the Government until it was found fortuitously by the trial Court.)

It is simply an oversimplification that does violence to the record to conclude that Manglitz volunteered to launder cash for marijuana traffickers, handled the money in these transactions, and that Carter did not know the source of the money. This is critically important because tested against a strong case, Government misconduct may be said to be harmless. This case was an exceptionally close case, with the jury deliberating over many days and acquitting the accused of the major drug count. To the extent that the Court of Appeals misunderstands the facts of the case, the balancing done by the Court of Appeals in deciding whether conduct by the Prosecutor found to be improper is harmful or harmless to the accused, is flawed.

LEGAL OVERSIGHT BY THE COURT OF APPEALS

In its Opinion, the Court states that "Manglitz claims that there were several instances where the prosecutor engaged in misconduct requiring reversal." In fact, the Brief of Appellant complains of repeated, intentional, and cumulative misconduct, including four acts of misconduct by the prosecutor before the Grand Jury, two acts of misconduct regarding pre-trial disclosure, two acts of misconduct in putting impermissible 404(b) evidence related to drug

trafficking with arrest and drug trafficking without arrest before the jury, two acts of misconduct related to improper evidence of witness tampering, one act of misconduct related to two separate instances of alleged bank fraud, four acts of miscellaneous misconduct, two instances of misrepresentation of witness testimony (Cooper and Forest) and four additional acts of misconduct related to closing argument, including two references to the Defendant's election to remain silent. Br. Appellant, 14-44.

To begin in logical sequence, Mr. Manglitz, by counsel, complains that because it affirmed the conviction of Mr. Manglitz, the Court of Appeals did not address the clear misconduct of the prosecutor in obtaining an indictment by presenting materially false evidence to the Grand Jury. The flawed logic of Grand Jury abuse is that the end, conviction, always justifies the means, even when there is clear prosecutorial misconduct. This is a particularly dissatisfying resolution of legal misconduct when the primary drug count ended in acquittal, and other charges ended in a hung jury.

The Court of Appeals did find that the Prosecutor committed a Brady violation. Specifically, the Court of Appeals found that "[T]here is no question that this material [Carter's statement exculpating Mr. Manglitz] was exculpatory or that the prosecution was obligated to turn it over." opinion, page 4. This is particularly ironic, for the trial court denied the pre-trial Brady for the reason that ". . . the prosecution in this district well knows its Brady obligations"

(J.A. 53). In holding that despite the fact that the prosecutor intentionally withheld exculpatory evidence he was obligated to turn over to the defense, that there " . . . was no Brady violation in the end . . ." the Court of Appeals chooses not to enforce its inherent supervisory power to ensure the fair administration of justice and to safeguard judicial integrity. United States v. Harrison, 716 F.2d 1050, 1053 n.1 (4th Cir. 1983). Viewed through the eyes of defense counsel, it appears that the Prosecutor in this case knew two things: (1) the Prosecutor knew his Brady obligations; and (2) the Prosecutor knew that Brady violations ordinarily will not result in reversal either because (a) the trial judge will police the prosecution in time to salvage the prosecution from its own misconduct, or (b) the Brady violation will go undetected. What is left unsaid, in this case as well as is that the very existence of Brady material not disclosed ought to undermine the confidence of the trial courts and appellate courts in the integrity of the prosecutorial process.

In its Opinion, the Court of Appeals also ratified the intentional conduct prosecutor in putting highly prejudicial evidence before the trier of fact and forcing defense counsel to seek judicial admonition. Regarding the arrest of Mr. Manglitz at the Texas-Mexican border, the Court of Appeals correctly finds that the prosecutor deliberately elicited evidence that had been excluded by pre-trial order of Judge Smalkin. Judge Smalkin excluded the evidence for the reason that a jury would be excited to irrational behavior

disproportionate to the probative value of the evidence. Apparently, the Court of Appeals misapprehends the facts of this prosecutorial transgression. The defense objection was sustained by Judge Maletz who did not hear the answer. Judge Maletz sustained an objection that he perceived was to the question. Following a luncheon recess, the Court made inquiry and then gave a curative instruction. Thus, the Court admonished the jury to disregard what it clearly heard and considered for more than one hour. The Court--after the fact--asked the jury to disregard clear evidence that Manglitz had a prior drug related arrest at the Texas-Mexican border. This is the fact that Judge Smalkin viewed as so highly prejudicial and of such low probative value that it might excite the jury to irrational conduct. Far from being harmless error in an overwhelming case, it provided linchpins of prejudicial effect on the he issue of knowledge.

The Court of Appeals further excused the misconduct of the prosecutor regarding witness Lee. The Court of Appeals wrote that: "Lee's isolated answer that referred to his unnamed drug partner, without more, could not be read to suggest that Manglitz had been a drug trafficker in the past." In so ruling, the Court of Appeals blinds itself to the closing argument of the Prosecutor. The Prosecutor used the Lee testimony to tell the jury in closing argument that Philip Manglitz had been a drug trafficker. "James Lee testified that he had previously given a hundred thousand dollars in cash, a hundred thousand dollars in drug money, to Philip Manglitz.

He gave it to Philip Manglitz because his partner was in Miami, he needed the money to complete a drug transaction . . ." (J.A. 345). Obviously, the Prosecutor argued that the jury could infer that which the Court of Appeals finds could not be read into the testimony. Philip Manglitz was portrayed as a drug trafficker, ferrying one hundred thousand dollars from James Lee to James Lee's partner in Miami. Again, the impermissible evidence excluded by Judge Smalkin was put before the jury by a Prosecutor intent that the jury learn about the excluded evidence and judge Philip Manglitz on the basis of the excluded evidence.

Perhaps of even more importance, the Court of Appeals ignores that the complaint of Philip Manglitz is that part of the prosecutor's argument--that Philip Manglitz is offering to pay Kleberg like he paid Lee--is made in direct contempt of the Court's sustaining the objection. Defense counsel faced a Prosecutor who ignored his constitutional duty in the presentment to the Grand Jury, his constitutional duty to disclose exculpatory evidence, his duty to abide by pre-trial rulings, and his duty to abide by trial court rulings. In retrospect, defense counsel failed the Client by abiding by the rules, and anticipating compliance by the Government. In a most egregious example of direct contempt for a Court's authority, one sentence after the trial court sustained a defense objection, the prosecutor challenged the jury to ignore the Court and submitted that he, the prosecutor, said that is what happened. Despite the Court's ruling, the Prosecutor invited

the jury its own determination. The Court's order notwithstanding, the Prosecutor then invited the jury to tell Manglitz [by its verdict] that he can't buy his way out of this one.

CONCLUSION

In oral argument, the Court questioned the prosecutor about straying too close to the edge. In affirming the conviction of Mr. Manglitz, the Court of Appeals ratifies the "end justifies the means" behavior of the prosecutor who (1) misrepresented the facts to a Grand Jury, (2) ignored the rule of law in Brady, (3) ignored the pre-trial rulings of Judge Smalkin, and (4) ignored the rulings of the trial court in matters of witness examination and closing argument.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful

BEST AVAILABLE COPY

conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). Regrettably, in affirming the conviction of Mr. Philip Manglitz, the Court of Appeals permits the Government to strike foul blows and use improper methods, satisfied that the foul blows and improper methods were harmless. Through the eyes of Mr. Manglitz, and through the experience of defense counsel, the misconduct was calculated to produce a wrongful conviction, and did produce a wrongful conviction.

Respectfully, the Defendant-Appellant, by counsel, prays this Honorable Court rehear this matter, or rehear this appeal en banc.

/s/ Clarke F. Ahlers
Clarke F. Ahlers, Esquire
Square 10450 Shaker Drive, Suite 111
Columbia, MD 21046
410-740-1444

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 12th day of May, 1998, caused a copy of the foregoing PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC by mailed by first class United States Mail to: Mr. Richard C. Kay, Esq., Assistant United States Attorney, 6625 United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201-2692.

/s/ Clarke F. Ahlers
Clarke F. Ahlers, Esquire

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED May 27, 1998

No. 96-4761
CR-95-314-S

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

PHILIP MANGLITZ
Defendant Appellant

No. 96-47W
CR-95-314-S

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

PHILIP MANGLITZ
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing in Banc

---

The appellant's petition for reheating and suggestion for rehearing in banc were submitted to this Court. As no

member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

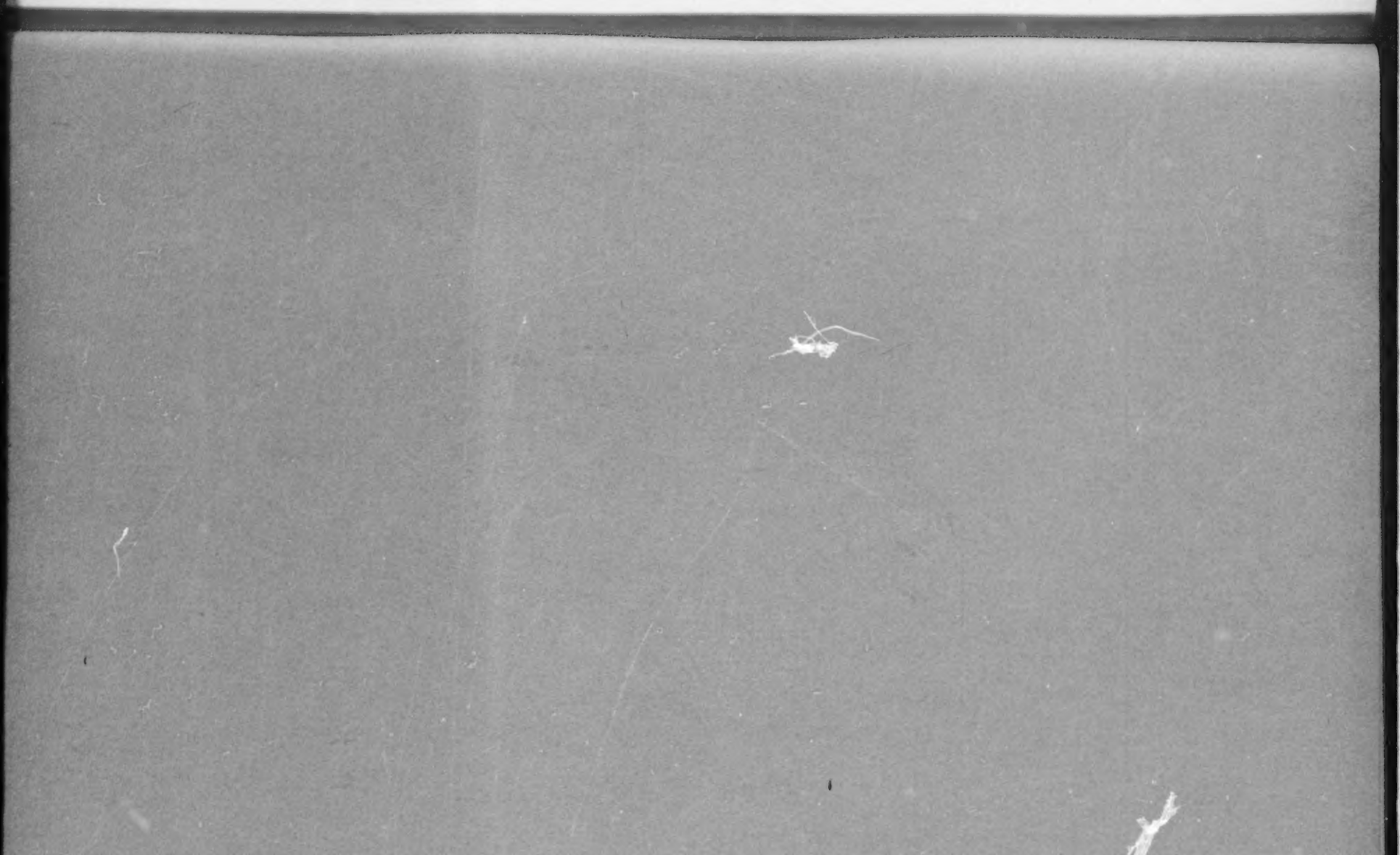
IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
NORTHERN DIVISION



UNITED STATES of America

v.

Philip MANGLITZ.

Crim. No. S-95-0314.

United States District Court for
the District of Maryland.

Aug. 27, 1996.

MEMORANDUM AND ORDER

MALETZ, Judge, Sitting by Designation.

On June 29, 1996, a jury convicted the defendant, Philip Manglitz of one count of conspiracy with the intent to distribute marijuana in violation of 21 U.S.C. § 846, one count of conspiracy to engage in monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1956(h) and four counts of engaging in monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957. The jury acquitted the defendant of possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841 and could not reach a verdict on two additional counts charging violations of 18 U.S.C. § 1957. Following his conviction, the

defendant timely filed a motion for an expansion of time to file a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and timely filed his Rule 33 motion within the expanded time period set by the court. For the reasons set forth below, the motion for new trial will be denied.

The defendant bases his motion for new trial on claims of prosecutorial misconduct during the course of the trial. The defendant claims that the prosecution violated his rights in four manners: (1) the introduction and improper use of prior bad acts in violation of Federal Rule of Evidence 404(b); (2) the distortion and misstatement of critical facts during the prosecution's closing argument; (3) improper comment upon the defendant's failure to testify; and (4) failure of the prosecution to provide discovery required under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In assessing claims of prosecutorial misconduct, the Fourth Circuit has instructed,

> The test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial.

United States v. Mitchell, 1 F.3d 235, 240 (4th

Cir.1993) (citations omitted).

The defendant's first claim is that the government violated Rule 404(b) by (1) introducing evidence that the defendant had discussed with Dana Kleberg, a cooperating co-defendant, his own previous drug dealing, (2) using the term "bank fraud" during the redirect examination of Ronald Carter, another cooperating co-defendant, (3) proffering tax evasion as a motive for the defendant's alleged criminal activity and (4) alleging that the defendant had engaged in obstruction of justice both previously when he paid James Lee to "keep quiet" about Mr. Manglitz's role in his prior drug dealing during Mr. Lee's incarceration and contemporaneously when he disposed of cash in his home. None of these four allegations, separately or taken together, meet the burden set forth in Mitchell in order to make a new trial appropriate.

One of the most hotly contested elements during the defendant's trial was his knowledge that the funds he was receiving from Dana Kleberg and Randolph Ayersman were the proceeds of specified illegal activity, to wit, marijuana distribution. To that end, prior to the beginning of the trial, the court held that the government would not be precluded from introducing evidence through Mr. Kleberg and Mr. Ayersman that the defendant had told each of them he

had previously been engaged in the distribution of marijuana. The court held that the government would be precluded from introducing detailed testimony about the nature or extent of the defendant's prior drug dealing, in order to avoid undue delay or unnecessary prejudice to the defendant. The court had previously ruled that the government would be precluded from introducing tapes where the defendant discussed his prior arrest for the possession with the intent to distribute fifty pounds of marijuana in Laredo, Texas, because the "risk that the jury will be excited to irrational behavior by such specific evidence of Mr. Manglitz's past drug trafficking activities is disproportionate to the probative value of such evidence." United States v. Manglitz, No. S-95-0314, slip opinion at p. 10 (D.Md. Jan. 25, 1996).

At trial, the government introduced evidence that during a flight from Acapulco to the United States, Mr. Manglitz discussed his prior drug dealing with Mr. Kleberg. When Mr. Kleberg testified that Mr. Manglitz admitted that he had been "arrested down on the Texas-Mexican border," the court sustained an objection by the defense, ordered the testimony stricken from the record and cautioned "you are very close." It was not improper for the government to introduce evidence that Mr. Manglitz brought up his knowledge of the methods and means of drug dealing

in order to prove that he had knowledge that the money he was obtaining from Mr. Kleberg was the proceeds of marijuana trafficking. The government erred when it introduced testimony about Mr. Manglitz's arrest, but the court took great pains to prevent any unfair prejudice to the defendant from any mention of his previous arrest, by striking the testimony and giving an immediate cautionary instruction to the jury. These actions were sufficient to dissipate the harm to the defendant. Richardson v. Marsh, 481 U.S. 200, 210, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987) ("juries are presumed to follow their instructions").

The defendant's next claim is that he was prejudiced by the government's introduction of the term "bank fraud" during the re-direct examination of Ronald Carter. Mr. Carter testified on direct examination that he had not signed some of the deeds which bore his name. On cross-examination, he testified that the defendant had removed himself as a partner in Carman Associates, the entity which owned the properties sold to Mr. Kleberg and Mr. Ayersman, during 1991. On re-direct examination, the government introduced through Mr. Carter documents signed by the defendant during 1991 which identified him as a general partner in Carman Associates. At this point, the government asked whether Mr. Carter

was familiar with the term "bank fraud," After Mr. Carter indicated that he was, the government did not further develop this line of questions.

The reference to "bank fraud" does not fall within the purview of Rule 404(b), because the "bank fraud" referred to occurred during and as a part of the charged money laundering.[5] "Evidence of uncharged conduct is not considered 'other crimes' evidence if it arose out of the same series of transactions as the charged offense, or if it is necessary to complete the story of the crime on trial." United States v. Kennedy, 32 F.3d 876, 885 (4th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 939, 130 L.Ed.2d 883 (1995). The government did not introduce extrinsic evidence of bank fraud, but rather placed the "bank fraud" label on evidence which was already properly before the jury. This did not constitute prosecutorial misconduct.

The defendant claims that the government engaged in reversible misconduct by speculating that

---

[5] The defendant did not make a contemporaneous objection to the use of the term "bank fraud." Therefore, under Federal Rule of Criminal Procedure 52(b), the defendant can only prevail on this point if the introduction of the term "bank fraud" constituted plain error. United States v. Young, 470 U.S. 1, 14-15, 105 S.Ct. 1038, 1045-46, 84 L.Ed.2d 1 (1985). The court finds that the introduction of the term "bank fraud" was not error at all, let alone plain error.

engaged in reversible misconduct by speculating that the defendant engaged in his money laundering activity in order to evade taxes. Throughout trial, the government established that there are large amounts of cash generated by the sale of narcotics, and that such cash is exceedingly difficult to use, because of governmental scrutiny of large cash transactions. The government introduced extensive evidence at trial that the defendant sold property to Mr. Ayersman and Mr. Kleberg, who were generating large amounts of cash through the distribution of marijuana. The government introduced evidence that payment was made through a combination of cash and certified checks, but that the sale price recorded on the deeds reflected only the value of the certified checks tendered. The evidence introduced by the government also established that the total sale price of these lots was at or near the original asking price for the property.

During closing argument, the defendant raised a series of questions to be answered by the government. The defendant specifically asked the government what motive the defendant would have to accept cash generated by drug sales at full value, when such funds were so difficult to spend. The defendant also repeatedly asked the government to explain why no IRS action was taken against Mr.

Manglitz, when a representative of the IRS was at the government's counsel table throughout the trial. The government responded:

> Remember, ladies and gentlemen, he was a developer, a developer of lots, building lots. He took the cash. It reduced the selling price of the lot, the asking price of the lot, it reduced the sale price of the lot, the price it was sold for, it showed less income for the business, for the company. He might declare a loss. He might show a loss or a very little bit of profit. So it made perfect sense for Philip Manglitz as well.

The defendant objects to this statement for two reasons: (1) the defendant was never charged with any tax offense and (2) there was no evidence submitted about the taxes, profits or losses claimed by the defendant. As the defendant did not make a contemporaneous objection to this argument, we review only for plain error. The plain error rule is to be used "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Young, 470 U.S. at 15, 105 S.Ct. at 1046 (quoting United States v. Frady, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982)).

The argument quoted above does not constitute plain error. The defendant clearly focused the jury's attention on the question of motive. Given the evidence that the defendant was

under-reporting the sale price of the lots on the deeds and bank records recorded, it was fair argument for the government to contend that the defendant intended to reduce the ostensible selling price of the lots. United States v. Robinson, 485 U.S. 25, 33, 108 S.Ct. 864, 869-70, 99 L.Ed.2d 23 (1988) (government permitted to make "fair response" to specific argument posed by defendant in closing).

To the extent that the government engaged in speculation by stating that the defendant "might have shown a loss or a very little bit of profit," this did not constitute plain error. First, the jury was specifically instructed that it was not to engage in speculation, and that the argument of counsel was not to be considered as evidence. Second, the jury returned a mixed verdict, unable to reach a conclusion on two of the counts of money laundering in addition to acquitting the defendant of possession with the intent to distribute marijuana. Such a mixed verdict "demonstrates [the jury] sifted carefully through all the evidence." United States v. Aramony, 88 F.3d 1369, 1379 n. 5 (4th Cir.1996); United States v. Porter, 821 F.2d 968, 972 (4th Cir.1987) ("Convictions should be sustained if it may be inferred from the verdicts that the jury meticulously sifted the evidence."), cert. denied, 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988).

The defendant claims that the government inappropriately accused him of two instances of obstruction of justice. First, the defendant argues that the government engaged in

reversible misconduct by contending that he had paid James Lee $1,000 to remain silent about the defendant's role in Mr. Lee's narcotics distribution. During the trial, James Lee testified that during the period of time in the 1980s he was incarcerated in Hagerstown, Maryland, he received $1,000 from the defendant. He further testified that he and the defendant did not have an understanding about the reason the defendant was sending him the money. Notwithstanding this testimony, the government attempted to show that there was an understanding between the defendant and Mr. Lee by introducing into evidence a tape recording where the defendant told Dana Kleberg:

> Manglitz: Well Dana, I told Randy this and I tell you this, if you guys come through stand up guys right, and you don't roll over, I'm gonna bend over backwards to help you do whatever you wanna do, help you do whatever it takes, okay? So if ah, if you were gonna go away for a year, two years, I don't think it's going to happen with 3 1/2 pounds.
> Kleberg: Well, it's a possibility.
> Manglitz: It is, but I don't think there is, but if you were, I'd work something out to ah, ah, borrow money from you, and pay interest on it, okay? Legal paperwork and stuff like that you can put away and watch you money grow as you sitting fat cat, I'll send you money while you're in there you know ...
> Kleberg: Toothbrush, and ...

> Manglitz: Everything, you can buy sneakers while you're in there when your sneakers wear out. All sorts of things ... this guy up in Hagerstown was even telling me he can buy a T.V. I sent him a thousand bucks ... Years ago, when, when he went down for, for a couple keys of coke, and ah, I sent him money for a T.V. He was top dog in there you know. If you got money to draw, most of the guys that go in there have gotten wiped out of everything.

Based upon this evidence, the government argued that the defendant was offering to pay Mr. Kleberg and Mr. Ayersman to go to jail without "rolling over" on him, and that the defendant had attempted to prove his bona fides in making this offer by informing Mr. Kleberg that he had earlier entered into a similar deal with Mr. Lee. The defendant timely objected to this argument, and the court overruled the objection stating, "Again, ladies and gentlemen, this is argument and, again, without placing the imprimatur of the court as to whether this a correct argument or not, I will leave that to you, and let the argument stand." The court will adhere to this ruling, as it was a permissible inference for the jury that the $1,000 given to Mr. Lee was given for his silence, and that the tape recording captured the defendant making a similar offer to Mr. Kleberg.

The defendant argues that the government overstepped fair argument at the conclusion of the argument. The

government concluded:

> He was offering to pay them, if they got locked up, to keep quiet. Ladies and gentlemen, tell Philip Manglitz that he can't buy his way out of this one. Tell him that the evidence shows beyond a reasonable doubt, tell him that he is guilty on all counts.

As the court has already stated, it was proper argument for the government to contend that the defendant was offering to pay Mr. Kleberg and Mr. Ayersman to remain silent. More problematic is the government's admonition to the jury to tell the defendant "he can't buy his way out of this one." This statement clearly implied that the jury should convict the defendant because he had previously successfully evaded prosecution for drug trafficking by paying Mr. Lee to remain silent. Courts have held that it is improper argument for the prosecutor to urge the jury to convict based upon extrinsic evidence, Mitchell, 1 F.3d at 240, or to "send a message". United States v. Wiedyk, 71 F.3d 602, 608 (6th Cir.1995); United States v. Badger, 983 F.2d 1443, 1456 (7th Cir.), cert. denied, 508 U.S. 928, 113 S.Ct. 2391, 124 L.Ed.2d 293 (1993) and cert. denied, 510 U.S. 820, 114 S.Ct. 76, 126 L.Ed.2d 44 (1993); United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir.1991). As there was no objection to this statement, the court will order a new trial only if the comments constituted plain error. Young, 470 U.S. at 15, 105

S.Ct. at 1046.

The court finds that the challenged statement does not reach the level of harmful error, let alone plain error. Applying the four factors stated in Mitchell, 1 F.3d at 240, the court finds that the statements did not "so prejudice the trial process as to require reversal." Id. at 241. Although the comments came at the close of the government's argument, a factor which weighs towards finding prejudice, id. at 243 (court must determine whether comments were deliberately placed before the jury), it was immediately followed by the government's refocusing on the jury on the evidence, "Tell him that the evidence shows beyond a reasonable doubt, tell him that he is guilty on all counts." Moreover, as noted above, the jury, through its mixed verdict showed an ability to sift through and evaluate the evidence without undue passion or prejudice. Aramony, 88 F.3d at 1379 n. 5. Finally, the jury was specifically instructed that it was to consider only the charges included in the indictment, and that the evidence of other bad acts had been admitted only for limited purposes, such as showing knowledge or intent. Richardson, 481 U.S. at 210, 107 S.Ct. at 1709 ("juries are presumed to follow their instructions"); Mitchell, 1 F.3d at 243 (limiting instructions reduce prejudice from improper argument).

The defendant claims that the government committed reversible error by arguing that the defendant had tampered with evidence. During his summation, the defendant included in his list of questions posed to the prosecution a query as to

why no cash had been found in the defendant's home during a search by the police. The government responded by stating:

> Government: ... You heard what Agent Forletta told you on the stand as an expert witness what happens when people know that someone in their group has been arrested, get rid of it, conceal it.
> Defendant: Objection.
> Court: Overruled.
> Government: It is gone, ladies and gentlemen. That is why we don't have it. It is gone.

The government overstated the testimony which Agent Forletta was permitted to give. The court allowed Agent Forletta to testify that drug traffickers often conceal evidence after a co-conspirator has been arrested. However, the court precluded Agent Forletta from testifying that drug traffickers often destroy evidence in similar situations, based upon a stipulation by counsel that there was "no evidence in the record that the defendant, Mr. Manglitz, ever destroyed any pertinent evidence or any evidence." Moreover, in the government's final statement, "That is why we don't have it. It is gone," the prosecutor appears to be stating his personal knowledge that the cash did exist at one time, but that the defendant moved or destroyed it after Mr. Kleberg and Mr. Ayersman were arrested.

It is axiomatic that a prosecutor is precluded from arguing facts which are not in evidence or from expressing a personal

opinion about the evidence. Young, 470 U.S. at 18, 105 S.Ct. at 1047-48. "Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." Id. The government's comments which indicated that Mr. Manglitz had destroyed evidence, despite the earlier stipulation that there was no evidence introduced at trial to support such an allegation, were inappropriate.[6] However, the court finds that this inappropriate comment does not, under Mitchell, require a new trial. The court bases this ruling upon the cautionary instructions given by the court, Mitchell, 1 F.3d at 243, the mixed verdict returned by the jury, Aramony, 88 F.3d at 1379 n. 5, and the fact that the comment came in direct response to the query of the defendant. Robinson, 485 U.S. at 33, 108 S.Ct. at 869-70.

The defendant's next claim is based upon the alleged mischaracterization of the testimony of Duncan Forest. Mr. Forest testified that he received a cash loan from the defendant in the amount of $25,000. He testified that he received the money in "approximately five stacks of bills" in a "brown paper bag." Mr. Kleberg and Mr. Ayersman each

---

[6] The court will treat the objection interposed by the defendant as relating to the second, as well as the first comment by the government.

testified that they gave cash to the defendant in brown paper bags, with the cash stacked in bundles of thousand dollars, with one stack often including $5,000. Both Mr. Ayersman and Mr. Kleberg signed a brown paper bag, exhibit 69, which was accepted as an illustrative exhibit.[7] Special Agent Forletta testified that drug traffickers often used multi-thousand dollar bundles to transfer large amounts of cash. Based upon this evidence, the government argued:

> He [Duncan Forest] told you Philip Manglitz brought him that money in Texas, in Austin, Texas, and it was bundled in thousand dollar bundles, exactly the way described by Kevin Antonacci, Robert Vivian, Dana Kleberg, and Randolph Ayersman. Thousand dollars bundles in Government's Exhibit Number 69, in a brown paper bag.
>
> I submit to you, ladies and gentlemen, that that brown paper bag of $25,000 cash, in those thousand dollar bundles, that Duncan Forest testified that he took directly from Philip Manglitz proves Philip

---

[7] Mr. Forest did not sign exhibit 69, although the government stated in closing argument that he had. The jury was informed prior to the beginning of deliberations that the parties had stipulated that the government was in error when it claimed that Mr. Forest had signed the bag. There was no prejudice from this misstatement.

> Manglitz was taking cash from Randy Ayersman and Dana Kleberg.

The defendant claims that this misstates the record, because Mr. Forest did not testify to thousand dollar bundles nor did he specifically agree that government exhibit 69 resembled the brown paper bag which he received from the defendant. The court finds that these statements were within the ambit of fair argument based upon the evidence, and therefore, did not constitute prosecutorial misconduct.

The defendant's next claim is that the government misstated the record in claiming that Jack Cooper, an attorney who was a partner with the defendant in some real estate holdings, was not present during the final encounter between Dana Kleberg and the defendant before the defendant's arrest. The evidence at trial showed that Mr. Manglitz directed that this meeting would take place in Mr. Cooper's office.

One of the questions which the defendant posed to the government during closing argument was why would the defendant arrange for the meeting to occur at a lawyer's office if he was intending to engage in a criminal act. The government responded,

> Why at Cooper's office? [Defense counsel] want to know why meet at the lawyer's office? Why go to Mr. Cooper's office? Why? Why not? Cooper is not there. No one said Cooper was there. Cooper wasn't even there.

Dana Kleberg's testimony fully supported this argument. Mr. Kleberg testified on cross-examination, "There wasn't a lawyer there.... I never saw a lawyer at the office. When we went into the conference room, it was just Mr. Manglitz, Mr. Carter and myself." There was nothing inappropriate about this argument by the government.

The defendant next asserts that the government inappropriately commented on his failure to take the witness stand during summation. At least four times during the defense summation, the defendant asked the government to explain why the defendant had refused to accept the $100,000 cash loan which Dana Kleberg offered him immediately before the defendant's arrest. The government responded:

> What happened when they got to Mr. Cooper's office? Mr. Jack Cooper's office, what happened when they got there in the parking lot? Philip Manglitz looks at the cash. Let's see it. Let's look at that cash. Let's look at it. Big bills, little bills. He doesn't say, let's the see the date on the check. He doesn't say that. Little bills, big bills. It is on the tape, ladies and gentlemen. He saw the money. He knew it was cash and he was ready to take it. Who knows? Only one person knows. Only person in the world who knows and that is Philip Manglitz, he knows. I don't know.

The defendant immediately raised an objection, which the

court overruled. The government then speculated on reasons, other than lack of knowledge that the loan was to be given in cash, why the defendant may have backed out at the last minute. Some of these reasons were phrased in the first person, from the defendant's perspective.

> What went wrong? Something is wrong here. I just don't feel right. I am calling this off. I am calling it off. I am not taking the cash. Cash? I didn't know it was cash. I thought it was a check. Baloney. That is absolute baloney, ladies and gentlemen. That is why he didn't take the cash. Listen to the tape. He knew it was cash. Cash. Baloney.

When the government reached the end of that section of its summation, the court gave a cautionary instruction.

> I do want to interrupt for one moment. There was an objection the court overruled. And, I, at this juncture, after completion of this phase of the government's argument in rebuttal, [the government] has argued that he, Mr. Manglitz, knows that. If there is any suggestion in that argument that you should draw any inference from the failure of Mr. Manglitz to testify that would be totally improper. I did not get that suggestion but possibly you could. There is no obligation on the part of Mr. Manglitz to testify, as I will instruct you, and this is terribly important, no inference

> whatsoever may be drawn from the fact that Mr. Manglitz did not take the stand and testify. None whatsoever. He has no burden whatsoever of presenting any testimony. The burden is totally on the part of the government of proving each ... essential element of the case, beyond a reasonable doubt.

Following this comment by the court, the government then made the following statement, which also drew objection from the defendant:

> I did not mean to suggest that in any way, ladies and gentlemen. The government's burden here is a very heavy one, extremely heavy. The government must prove its case beyond a reasonable doubt but, we accept that burden. We accept it everyday. We come in here to prove things to you, beyond a reasonable doubt, with evidence. With evidence. And that is what I ask you do, ladies and gentlemen, look at the evidence. Use your common sense and look at the evidence. and we have met that burden. I don't mean to suggest anything else to you about the defendant not taking the stand.

In response to the defendant's objection, the court asked the government to "Repeat what you just said. I don't want to emphasize it but I have an objection [before me]." The

government responded, "I don't want to suggest anything to you about Mr. Manglitz not taking the stand. I did not suggest that and I will not suggest that to you." The court then restated that, "I can't be more positive about considering ... improper any suggestion by counsel for the government with respect to the defendant, Mr. Manglitz, not having taken the stand."

The Fifth Amendment to the Constitution "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965). Where the prosecution does not directly comment upon the failure of the defendant to testify, the court must determine, "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" United States v. Francis, 82 F.3d 77, 78 (4th Cir.) (quoting United States v. Anderson, 481 F.2d 685, 701 (4th Cir.1973), aff'd, 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974)), cert. denied, --- U.S. ----, 116 S.Ct. 2513, 135 L.Ed.2d 202 (1996).

Although the court did not believe that the statements by the government violated the Anderson test, out of an abundance of caution, the court treated the statements as if they had and gave immediate cautionary instructions to the jury. Cf. United States v. Carroll, 678 F.2d 1208, 1209-10

(4th Cir.1982) (cautionary instruction 30 minutes after improper statement and after the court had initially admonished the defendant for raising an objection ineffective to remove taint of improper comment on defendant's failure to testify). Even if taken as a comment on the defendant's failure to testify, the government's argument came in response to the defendant's express invitation for the government to explain why the defendant did not take the $100,000 cash. "It is one thing to hold, as we did in Griffin, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence." Robinson, 485 U.S. at 33, 108 S.Ct. at 870. The defendant called upon the government to explain his actions immediately prior to arrest. The government responded by pointing to evidence which indicated that all reasonable explanations of the defendant's conduct were consistent only with guilt, but refusing to make an absolute declaration of what motivated the defendant, as the workings of his mind are known only to him. Under Robinson, especially given the repeated and emphatic cautionary instructions of the court, the defendant's rights under the Fifth Amendment were not abridged.

The defendant's final argument is that he was deprived of a fair trial by the prosecution's failure to produce material

subject to disclosure under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, the Brady material was turned over to the defendant during trial on the direction of the court.[8] "No due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial." United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir.), cert. denied, 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985). The defendant acknowledges that the Brady material was produced prior to the cross-examination of the relevant witnesses. Moreover, the court allowed the defendant to recall witnesses for further cross-examination based upon the late arriving Brady material. The defendant now claims that "the statement could have served as the basis for investigating potentially exculpatory leads," but does not identify any such leads and did not request a continuance at the time the Brady material was produced. The Brady discovery, although not perfect, did not deny the defendant a fair trial.

The Constitution guarantees the defendant a fair trial, not

---

[8] "The fact that disclosure came from a source other than the prosecutor is of no consequence. When determining the constitutional validity of a belated Brady disclosure, the relevant inquiry is solely whether the defendant was able to effectively use the exculpatory information." United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 n. 6 (4th Cir.), cert. denied, 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985).

a perfect one. United States v. Blevins, 960 F.2d 1252, 1254 (4th Cir.1992). The court has considered each of the claims of prosecutorial misconduct made by the defendant and finds that none of them, considered separately or together, warrants that the convictions obtained be set aside and a new trial be ordered. For all the reasons set forth above, the motion of the defendant for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure will be denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NORTH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.
	)	S-95-0314
PHILIP MANGLITZ,	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR
PRODUCTION OF BRADY MATERIAL

Pursuant to Federal Rule of Criminal Procedure 12(b), Philip Manglitz, by undersigned counsel, hereby moves the Court for an order directing the prosecution to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and progeny. The grounds for the motion are set forth in the accompanying memorandum in support of the motion. A proposed order accompanies this motion.

Respectfully submitted,
/s/ David J. Curtin

David J. Curtin
Adam S. Hoffinger
Debra Ornstein
SCHWALB, DONNENFELD, BRAY
& SILBERT, P.C.
1025 Thomas Jefferson Street, N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910

Counsel for Defendant
Philip Manglitz

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NORTH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.
	)	S-95-0314
PHILIP MANGLITZ,	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT 0F DEFENDANT'S
MOTION FOR PRODUCTION OF BRADY MATERIAL

Defendant Philip Manglitz respectfully submits this memorandum in support of his motion for an order directing the prosecution to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 and progeny.

FACTUAL BACKGROUND

The indictment in this action, returned on July 27,1995, charges Mr. Manglitz with seven money laundering and two marihuana-related offenses and seeks criminal forfeiture of currency and liens against title totaling $992,500.

Counts Three through Nine of the indictment charge that Mr. Manglitz, a real estate developer, sold properties to Randolph Ayersman and Dana Kleberg in order to launder the proceeds of Ayersman's and Kleberg's marihuana trafficking. Count One alleges that Mr. Manglitz participated in, conspiracy With Ayersman, Kleberg and unnamed others to distribute and possess with intent to distribute "a detectable amount" of marihuana. Count Two charges that, on one occasion in 1992, Mr. Manglitz possessed with intent to distribute marihuana.

Randolph Ayersman and Dana Kleberg are the only co-conspirators named in the indictment; both the marihuana conspiracy and the money laundering conspiracy counts allege that others known and unknown to the grand jury participated in the conspiracies. Ronald Carter, Mr. Manglitz' partner in his real estate development partnership Carman Associates, is named in the indictment. All three of these individuals, upon information and belief, are cooperating with the Government against Mr. Manglitz.[1]

Counsel for Mr. Manglitz have made repeated and specific written requests for Brady material. See August 9,

---

[1]In this case, the prosecution has not provided the defense with any plea agreements, proffer letters, or cooperation agreements, except the plea agreement of Ronald Carter, dated June, 26, 1995, which was filed by the prosecutor as an exhibit to his summary judgment motion in the civil forfeiture case. Tape-recorded conversations furnished through discovery reveal that Randolph Ayersman and Dana Kleberg both taped conversations and meetings with Mr. Manglitz.

1995 Letter from Adam Hoffinger, Esq. to Richard Kay, Esq., at pages 5 - 6 (copy attached as Exhibit A); September 14, 1995 Letter from Debra Ornstein, Esq., to Richard Kay, Esq., at page 5 (copy attached as Exhibit B); September 22, 1995 Letter from Debra Ornstein, Esq., to Richard Kay, Esq., at page 2 (copy attached as Exhibit C). Other than a single statement of Ronald Carter paraphrased in a letter to counsel for Mr. Manglitz dated September 19, 1995, the prosecution has not provided any material specifically designated as exculpatory. In addition, notwithstanding requests that it do so, the prosecution has not stated whether all Brady material has been furnished to the defense, whether the prosecutor himself personally reviewed materials for exculpatory evidence, and whether the prosecutor has reviewed files of the Howard County police for exculpatory materials. See September (Exhibit C).[2]

Furthermore, because the prosecution has not responded to Mr. Manglitz, specific requests for Brady discovery, the defense does not know whether the prosecution objects to any of these Brady requests. For instance, Mr. Manglitz has requested that the prosecution furnish all

---

[2]The prosecution has stated that no Brady material was contained in seized materials returned to Messrs. Ayersman, Kleberg, Carter, Garufi and others. These materials unfortunately were returned before Mr. Manglitz' counsel was afforded access to them, prejudicing the defendant's ability to ensure a complete Brady production. Counsel for Mr. Manglitz have requested that the prosecutor facilitate their access to the returned materials.

exculpatory witness statements, including those that reflect a witness' failure to corroborate a matter the prosecution intends to prove in its case-in-chief. See August 9, 1995 Letter (Exhibit A); September 14, 1995 Letter (Exhibit B). Counsel for Mr. Manglitz has no way of knowing whether such statements have not been provided because none exist, or because the prosecution is withholding such statements. The prosecution's non-responsiveness, therefore, has necessitated the filing of this motion. This motion seeks an order directing the prosecution to comply with its obligations under Brady v. Maryland and progeny, and directing that the prosecution so inform the Court and counsel for Mr. Manglitz when it believes that it has complied with its Brady obligations.

ARGUMENT

It is axiomatic that "the prosecution [has an] affirmative duty to disclose evidence favorable to a defendant." Kyles v. Witley, U.S. 115 S.Ct. 1555, 1565 (1995). The prosecution's duty to furnish favorable evidence to the defense under Brady v. Maryland, 373 U.S. 63 (1963), and progeny includes both exculpatory and impeachment evidence. 115 S.Ct. at 1565; United States v. Bagle , 473 U.S. 667 (1985). The failure of a potential Government witness to corroborate a matter the prosecution intends to prove at trial - due to loss of memory, lack of knowledge, or otherwise -

constitutes Brady material and must be disclosed to the defense. Levin v. Katzenbach, 363 F.2d 287, 291 92 (D.C. Cir. 1966).

As for the timing of discovery that implicates both Brady and the Jencks Act, in the absence of a particularized showing of jeopardy to the witnesses whose statements are to be revealed, the important due process "guarantees of Brady must take precedence over the procedures of the Jencks Act. See United States v. Shifflett, 798 F. Supp. 354, 356-57 (W.D. Va. 1992) (ordering early disclosure of exculpatory statements contained in grand jury transcripts). As the Shifflett court pointed out, quoting United States v. Holmes, 722 F.2d 37, 40 (4th Cir. 1983), "the Jencks Act (itself] contemplates not only the furnishing of the statement of a witness but a reasonable opportunity examine it and prepare for its use in the trial." 798 F. Supp. at 356.

The Government's Brady obligation extends beyond disclosing to the defendant favorable evidence that has come to the attention of the prosecutor: "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the Government's behalf in the case, including the police." Kyles, 115 S.Ct. at 1567. Under Kyles, the prosecutor himself must personally review materials for Brady evidence. United States v. Lacy, No. CR-94-0384 MHP, 1995 U.S. Dist. LEXIS 12252 (N. D. Cal. Aug. 18 1995). Furthermore, if the prosecutor intends to withhold material and "if doubt exists as to whether any material is

exculpatory, the prosecutor has an obligation to submit such material to the court for in camera inspection." Holmes, 722 F. 2d at 41.

Accordingly, Mr. Manglitz is entitled to an order requiring the prosecution to furnish the defense with all materials responsive to the specific Brady requests made at pages 5-6 of its August 1995 letter (Exhibit A) as well as all other favorable evidence known to the prosecution and those acting on its behalf. In addition, the Court should direct the prosecutor to personally review for Brady material all pertinent files within the possession, custody or control of the U.S. Attorney's office, the Drug Enforcement Administration, the Internal Revenue Service, the Howard County Police, cooperating witnesses, and other individuals and entities that may be acting on behalf of the prosecution.

CONCLUSION

For the foregoing reasons, Mr. Manglitz respectfully requests that the Court grant his motion, and that an order be entered in the accompanying form directing the prosecution to furnish all Brady material to the defense.

Respectfully submitted,

/s/ Debra Ornstein
David J. Curtin
Adam S. Hoffinger
Debra Ornstein

SCHWALB, DONNENFELD, BRAY
& SILBERT, P.C.,
1025 Thomas Jefferson Street, N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910
Counsel for Defendant
Philip Manglitz

Exhibit A

Richard C. Kay, Esq.
Assistant United States Attorney
United States Attorney's office for the
District of Maryland
820 United States Courthouse
102 W. Lombard Street
Baltimore, MD 21201-2692

Re: United States v. Philip Manglitz,
No. MJG-95-0314

Dear Richard:

This letter will serve as defendant Philip Manglitz's first formal request for discovery pursuant to the Fifth and Sixth Amendments to the United States Constitution, Federal Rule of Criminal Procedure 16 (a) , Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, including United States v. Agurs, 427 U.S. 97 (1976) and Giglio v. United States, 405 U.S. 150 (1972), and the Jencks Act (18 U.S.C. 3500). We also take this opportunity to make certain pre-trial requests pursuant to the Federal Rules of Evidence.

Mr. Manglitz requests that the government produce

and permit the inspection and copying of the following:

REQUESTS PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 16

Statements by Defendant (Rule 16(a)(1)(A))

A. All relevant written or recorded statements made by Mr. Manglitz, and the written records containing the substance of any relevant oral statements made by Mr. Manglitz whether before or after arrest in response to interrogation by any person then known to Mr. Manglitz to be a government agent. This request includes but is not limited to all tape-recordings and transcripts of conversations in which Mr. Manglitz was a participant that are in the government's possession and all reports, notes, memoranda, or other documents which refer, reflect, or relate to any statements made by Mr. Manglitz.

B. The substance of any other relevant oral statements that the prosecution intends to use at trial that were made by Mr. Manglitz, whether before or after arrest, in response to interrogation by any person then known to Mr. Manglitz to be a government agent.

Prior Record of Defendant (Rule 16(a)(1)(B))

C. A copy of Mr. Manglitz's prior criminal

record.

Documents and Physical Evidence (Rule 16 (a) (1) (c))

D. All books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, that were obtained from or belonged to Mr. Manglitz, either individually, or in his capacity as a general partner of Carman Associates. This request includes, but is not limited to, all items seized pursuant to the search warrants executed at 2828 Shadow Roll Court, Glenwood, Maryland and at 1750 Daisy Road, Woodbine, Maryland. Mr. Manglitz also requests any other written records or inventories of the property seized at both of these addresses, in addition to what was provided to him at the time of the seizure.

E. All books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, that the prosecution intends to use at trial as evidence in its case-in-chief. This includes not only those documents that will be marked and offered into evidence, but also those that will be relied upon or referred to in any way by any witness (including any expert witness) called by the prosecution during its case-in-chief.

F. All books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, in the government' s. possession that is material to the preparation of the defense, including, but not limited to, all

documents and physical evidence within each of the following categories:

1. All tape recordings and transcripts of conversations in which Mr. Manglitz was a participant or was referenced.
2. All materials related to court authorized or other eavesdropping (including, but not limited to, wiretaps, pen registers, bugs or other forms of electronic surveillance) of Mr. Manglitz, any alleged co-conspirator of Mr. Manglitz, any potential witness in this case, or that otherwise relates to any of the allegations contained in the Indictment.
3. All calendars, appointment books, telephone logs and diaries of any alleged co-conspirator, witness or past or current partner, employee, or agent of Carman Associates (or any predecessor or related entities) that contain references to Mr. Manglitz.
4. All documents and physical evidence that reflect that Mr. Manglitz conspired with Randolph Ayersman, Dana Kleberg, or "others known and unknown to the Grand Jury" to possess and distribute marihuana as alleged in the Indictment.
5. All documents and physical evidence that reflect Mr. Manglitz's conduct or activities on

December 19, 1992.

6. All documents and physical evidence that reflect any drug use by Mr. Manglitz between 1987 and May 12, 1995.

7. All documents and physical evidence that reflect Mr. Manglitz conspired with Randolph Ayersman, Dana Kleberg or "others known and unknown to the Grand Jury" to engage in monetary transactions in criminally derived property as alleged in Count Three of the Indictment.

8. All documents and physical evidence that reflect the "different roles" and "different tasks" "played" by the conspirators as alleged in Count Three, Part B, paragraph 1 of the Indictment.

9. All documents and physical evidence relating to each of the allegations contained in Counts Three through Nine and the Forfeiture allegations of the Indictment.

10. All documents and physical evidence relating to the financial transactions alleged in Count Three, part C., overt acts 1 to 31, and in Counts Four through Nine of the Indictment.

11. All documents and physical evidence that reflect Mr. Manglitz's role in the financial transactions alleged in Count Three, part C.,

overt acts 1 to 31, and in Counts Four through Nine of the Indictment.

12. All documents and physical evidence that reflect Ronald Carter's role in the financial transactions alleged in Count Three, part C., overt acts 1 to 31, and in Counts Four through Nine of the indictment.

13. All documents and physical evidence that reflect that Ronald Carter conspired with Randolph Ayersman, Dana Kleberg, and others, including, but not limited to, Mr. Manglitz, to engage in monetary transactions in criminally derived proceeds as alleged of Mr. Manglitz in Count Three of the indictment.

14. All documents and physical evidence that reflect that Mr. Manglitz knew that any currency or checks he or Carman Associates received from Messrs. Ayersman and/or Kleberg were criminally derived proceeds and/or knew that they were proceeds of marihuana trafficking as alleged in the Indictment.

15. The names and addresses of all co-conspirators known to the government.

16. The names and addresses of persons who testified in the grand jury of this matter.

17. The inspection of any mixture, substance, or sample containing marihuana, which the government intends to introduce in its case-in-chief.

Reports of Examination and Tests (Rule 16(a)(1)(D))

G. All requests for (including reference letters) and results of reports of physical or mental examinations, or scientific tests or experiment (or copies thereof) or expert analyses that are in the possession, custody or control of the government and which the government intends to use in its case-in-chief or which are material to the preparation of the defense. This request includes but is not limited to any tests performed on any mixture, substance, or sample containing marihuana, which mixture, substance, or sample the government contends was in the possession of Mr. Manglitz.

Expert Witnesses (Rule 16 (a) (1) (E))

H. A written summary of any testimony the government intends to introduce under Federal Rules of Evidence 702, 703 or 705 during ,its case in chief.

BRADY REQUESTS

I. All information that is exculpatory, tends to cast

doubt on Mr. Manglitz's guilt, or which tends to reduce his culpability. This request includes information that affects the credibility of government witnesses, as well as directly exculpatory information. This request includes, but is not limited to, all arrests and convictions of government witnesses; all cooperation agreements, proffer agreements, deals, inducements, or promises, whether implicit or explicit, given in exchange for their testimony; all criminal charges, probation or parole revocation proceedings, or criminal investigations pending against any government witness at any time from his or her first contact with your office until the final resolution of this case; all juvenile charges, probation, or aftercare revocation proceedings pending against any government witness; all violations of probation, parole, mandatory release, work release, or pretrial release by any government witness; all statements by any government witness that are inconsistent with' that witness' grand jury testimony and/or anticipated trial testimony; and any prior hostility between any government witness and Mr. Manglitz that could generate testimonial bias.

This request further includes, but is not limited to:

1. All information in the government's possession, including, but not limited to, informal notes and memoranda of interviews, that tends to show that Mr. Manglitz did not possess, use, possess with intent to distribute, or distribute illegal narcotics, including

marihuana. This includes, but is not limited to, the names and addresses of all individuals questioned by the government who have not responded affirmatively to questions regarding whether Mr. Manglitz possessed, used, possessed with intent to distribute or distributed illegal narcotics at any time or on any particular occasion.

2. All information in the government's possession, including, but not limited to, informal notes and memoranda of interviews, that tends to show that Mr. Manglitz did not believe that Randolph Ayersman and Dana Kleberg sold or used illegal narcotics.

3. All information in the government's possession, including, but not limited to, informal notes and memoranda of interviews, that tends to show that individuals other than Mr. Manglitz did not know or believe that Randolph Ayersman and Dana Kleberg sold or used illegal narcotics. This includes, but is not limited to, the names and addresses of all individuals questioned by the government who have indicated that they knew Mr. Ayersman and/or Mr. Kleberg but were unaware (prior to December 1994) that either of them sold or used illegal narcotics.

4. All information in the government's possession, including, but not limited to, informal notes and memoranda of interviews, that tends to show that Mr. Manglitz and/or individuals other than Mr. Manglitz believed that Mr. Ayersman and/or Mr. Kleberg were engaged in legitimate business activities. This includes, but is not limited to, the names and addresses of all individuals questioned by the government who indicated that they believed (prior to December 1994) that Mr. Ayersman and/or Mr. Kleberg were engaged in legitimate business endeavors.

5. All information in the government's possession, including, but not limited to, informal notes and memoranda of interviews, that tends to show that Mr. Manglitz did not accept currency in connection with the sale of real estate or other property.

6. All information in the government's possession, including, but not limited to, informal notes and memoranda of interviews, that tends to show that Mr. Manglitz accurately recorded the purchase price of real estate or other property sold by him or any entity with whom he was associated, and/or that Mr. Manglitz complied with formalities

imposed by law, custom or practice governing the transfer or sale of real estate or other property.

7. All information tending to show that Mr. Manglitz did not act or have knowledge as alleged in any count or paragraph of the Indictment.

8. A list of names and addresses of grand jury witnesses who will not be called in the government's case in chief.

REQUESTS PURSUANT TO FEDERAL RULES OF EVIDENCE

J. Pursuant to Rule 1006, Federal Rules of Evidence, Mr. Manglitz requests that he be advised whether the prosecution will seek to offer any chart, summary or calculation in evidence and that all writings, recordings, or other information on which such charts, summaries or calculations are based be made available for inspection and copying.

K. Pursuant to the provisions of Rule 104, Federal Rules of Evidence, and Mr. Manglitz's right to effective representation by counsel and a fair trial, Mr. Manglitz requests that he be advised whether the prosecution intends to offer, in its case-in-chief, as a statement by Mr. Manglitz, any of the following:

1. Any statement as to which Mr. Manglitz manifested his adoption or belief in its truth. Fed. R. avid. 801(d)(2)(B);
2. Any statement made by another which was purportedly e y authorized by Mr. Manglitz. Fed. R. Evid. 801 (d)(2)(C);
3. Any statement by an agent, servant, partner, or employee of Mr. Manglitz concerning a matter within the scope of his agency or employment made during the existence of a relationship. Fed. R. Evid. 801(d)(2)(D); and
4. Any statement by a co-conspirator during the course of and in furtherance of any alleged conspiracy. Fed. R. Ev i d. 8 0 1 (d) (2) (E) .

L. Pursuant to the Fifth and Sixth Amendments to the United States Constitution and Federal Rule of Evidence 404(b), Mr. Manglitz requests that the prosecution disclose all evidence of similar crimes, wrongs or acts, allegedly committed by Mr. Manglitz, upon which the prosecution intends to rely to prove motive, scheme, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

REQUESTS PURSUANT TO THE JENCKS ACT

M. Mr. Manglitz requests that the prosecution provide a list of names and addresses of all witnesses that it intends to call in its case-in-chief and, at some point

reasonably in advance of trial so that they may be utilized without undue delay of the trial, all statements of those witnesses in the government's possession, custody, or control, including notes of interviews, grand jury testimony and/or sworn statements in lieu thereof.

We hope to have an opportunity to speak with you following the arraignment on Friday to arrange for our access to these discovery materials. We would like to obtain copies and transcripts of the tapes and gain access to the documents seized from Mr. Manglitz and . . . . .

Exhibit B

September 14, 1995

BY FACSIMILE AND MAIL

Richard C. Kay, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office for the
District of Maryland
820 United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: United States v. Philip Manglitz, No. S-95-0314

Dear Richard:

This letter is a follow-up to our August 9, 1995 letter initially requesting discovery and to our ongoing discussions regarding discovery. There are some outstanding issues that need to be resolved before the October 2 deadline for filing pretrial motions.

DISCOVERY PROVIDED BY THE GOVERNMENT

At the IRS, on August 16, we inspected 9 boxes of

materials seized from Mr Carter, Mr. Garufi, Carman Associates, and Mr. Man 'z and two boxes of materials obtained from the accounting firm, Reznick, Fedder & Silverman, P.C. On September 11, Agent Morris provided us with access to the files contained on Mr. Carter's computer when it was seized, with copies of diskettes seized from Mr. Carter's residence, and with copies of photographs and a videotape taken by the IRS during the search of Mr. Carter's residence.

At DEA, on September 11, we inspected 12 boxes of documents. Seven of the boxes contained materials seized from Mr. Manglitz's residence, four contained materials seized from Mr. Carter's residence, and one box contained some materials seized from Randy Ayersman's residence. We also viewed a number of bags of evidence: some contained items seized from Mr. Manglitz's residence, one contained items seized from Mr. Kleberg's residence, and another contained items seized from Mr. Ayersman's residence. There were loose photographs and a videotape of the processing of evidence from Ayersman's residence as well.

Following our review, Agent Forletta indicated that he would be sending us a copy of the Ayersman videotape, a copy of a blank check designated as N-130, a copy of the registration to a van designated as N-106, and a copy of Mr. Manglitz's passports. During our brief review of materials at DEA on August 16, there were five boxes of materials, all of which we believe also were present on September 11. On

September 11, the DEA returned seven boxes of documents to Mr. Manglitz; Agent Forletta has indicated that one more box is being returned to Mr. Manglitz. We would appreciate your determining whether we have had access to all of the materials seized from Mr. Manglitz's residence; it appears that some items that the government may have seized have not been available for our inspection or returned to Mr. Manglitz. You also have provided us with copies of audiotapes and a videotape of conversations and meetings involving our client, and with transcripts of the audiotapes. You were going to determine whether there is a draft transcript of the videotape and of N-95, which is identified as an audio cassette of a meeting. Kindly advise us of what you have learned with respect to these items. Our August 9 discovery request also sought recordings and transcripts of conversations or meetings in which Mr. Manglitz was referenced. Please let us know whether any such recordings exist. Also please advise us whether there are any materials responsive to item F.2 of our August 9 discovery request which have not been provided.

Furthermore, you have provided us with copies of search warrants executed at the residences of Messrs. Manglitz, Carter, Ayersman, Kleberg, and Garufi, with a copy of a pen register printout from Mr. Manglitz's residence, and with a copy of a videotape of the search of Mr. Manglitz's residence.

My understanding is the only materials you have said

that you are making available to us which we have not yet reviewed are certain materials from the Aguirre case and pen register printouts from the residences of Ayersman, Kleberg, Garufi and possibly others. Agent Forletta indicated that it would be a few weeks before the pen register printouts would be available, and that he would send them to us. If there is anything you can do to hasten their delivery to us, we would appreciate it.

With respect to materials from U.S. v. Aguirre, you indicated that there are taped conversations, weapons, nightscopes, and possibly some videotapes and documents relative to Randy Ayersman, which we can inspect and copy. On September 11, Agent Forletta indicated that there were six audiotapes (four of conversations between Aguirre and Randy Ayersman and two of conversations between Aguirre and Wilbur Ayersman.) We will be contacting Agent Forletta to arrange to hear the audiotapes or to have copies made of the tapes. Please let us know whether there are documents and videotapes regarding the Aguirre case that fall within the scope of our August 9 discovery requests.

RECIPROCAL DISCOVERY

As we have previously indicated, we acknowledge our obligation to provide reciprocal discovery under the requirements set forth in Rule 16(b). In any event, your repeated requests for Rule 16(b) materials are somewhat

puzzling considering the extensive materials seized by the government from Mr. Manglitz, Carman Associates and other persons and entities.

OUTSTANDING ISSUES

(1) Your letter of August 28 indicated that the government was providing us with access to those "materials seized from Ronald Carter, Randolph Ayersman, Dana Kleberg and Kenneth Garufi, and others related to this case," which the government had not already returned to these individuals. You indicated that you had returned most of the materials seized from these individuals, and that the "retained materials" were to be available for our review at DEA on September 11.

(a) Please advise whether there are any retained materials that were not made available to us at DEA on September 11. We saw only one box of materials seized from Garufi's residence, and there was only one small bag of items obtained from Kleberg's residence. In addition, other than a bag of evidence containing an address book, the materials seized from Ayersman's residence amounted to less than a third of a box and consisted primarily of calendars. Finally, I do not know to whom the reference "others related to this case" referred in your August 28 letter, but the boxes and bags of evidence I reviewed were marked as having been seized from either Messrs. Manglitz, Carter, Ayersman, or Kleberg.

Please let us know to whom this reference refers, and whether you will be providing us with additional discovery as to Ayersman, Kleberg, Garufi or others.

(b) As for the seized materials of "Ronald Carter, Randolph Ayersman, Dana Kleberg and Kenneth Garufi, and others related to this case" that the government has returned, we disagree that it is our responsibility to address access to these materials directly with these individuals and/or their counsel. (Of course, this would be particularly difficult with respect to "others related to this case.") If any of the returned materials constitute Brady, Jencks, Giglio or Rule 16 material, the government has an obligation to make such material available to Mr. Manglitz if such material was in the possession, custody or control of the government at or since the time of the indictment of Mr. Manglitz. Moreover, notwithstanding the government's position on the timing of discovery of Jencks or Giglio material, the government must turn over Brady material at the time the government becomes aware of the existence of exculpatory material. Accordingly, any exculpatory material included in the returned materials already should have been provided to Mr. Manglitz. We therefore request that the government provide us with copies of all Brady, Jencks, Giglio or Rule 16 materials that the government has returned to Messrs. Carter, Ayersman, Kleberg, Garufi and "others related to this case."

Relatedly, on September 11, I asked Agent Forletta whether there were any lists or inventories prepared of the

returned materials. Agent Forletta indicated none existed other than the generic itemization on the form acknowledging the return of the materials to their owner. I requested a copy of the executed forms; Agent Forletta deferred to you. Please forward copies of these forms to us at your earliest convenience. Judging from the form Mr. Manglitz executed on September 11, these forms should reveal the number of boxes and the exhibit numbers of the returned materials. In addition, if you are not going to facilitate our access to the returned materials, please furnish us with a copy of any cooperation, proffer or other agreements between the government and any of these individuals (Ayersman, Carter, Kleberg, Garufi and "others related to this case"). We requested such agreements in our August 9 letter, and, as you no doubt would agree, the existence and contents of any such agreements bears on whether the government continues to exercise control over these materials.

(2) You have not indicated whether you will furnish Jencks material at least one week prior to trial. Adam Hoffinger's August 21 letter set forth our position with respect to the provision of Jencks material; however, we have not received a response from you on this issue.

(3) Similarly, you have not advised us whether you will be providing Giglio material on the same basis as Brady. This matter also was raised in our August 21 letter.

(4) Our August 21 letter also discussed the timing of notice of the government's intent to introduce 404 (b)

evidence, and of discovery of 404(b) material. You have not furnished us with any notice or discovery of 404(b) material, nor have you responded to our August 21 letter concerning this.

(5) In addition, you have not advised us of the identity of co-conspirators known to the grand jury, as requested in our August 9 letter; nor, have you indicated your position on this request. Your August 28 letter referencing "others related to this case" was not illuminating, and serves as a further indication that there may be other individuals with whom the government contends Mr. Manglitz conspired of whom we are unaware.

We hope to avoid the need to burden the court with motions regarding the aforementioned items. With the October 2 deadline for pretrial motions approaching, we need to know the government's position on these issues immediately.

(6) In addition, notwithstanding our requests, the government has not formally responded to our August 9 letter requesting discovery. We realize that the discovery that has so far been provided is responsive to some of our requests; however, without a response from the government we do not know whether we have had access to all responsive materials to which we are entitled. More important, there are a number of requests for which we have received no discovery. Unless the government states its position as to such discovery, we have no way of knowing whether we have rot been furnished

with responsive materials because none exist (in which case, there is no need for a motion), or because the government objects to the request.

For example:

(a) We have not been provided with any discovery pertaining to Mr. Manglitz's alleged involvement in a drug conspiracy as alleged in Count One of the indictment, or relating to alleged drug use by Mr. Manglitz in December 1992 as alleged in Count Two of the indictment. We also have not been provided with access to any samples of controlled substances, or reports concerning controlled substances, allegedly possessed, used, or possessed with intent to distribute by Mr. Manglitz.

(b) We have not been provided with any materials designated as Brady. For example, it is difficult to believe that no witness denied or lacked knowledge of any event or transaction in which the government contends Mr. Manglitz was a participant, or otherwise said anything exculpatory concerning Mr. Manglitz. Please advise us whether there is Brady material that has not been produced.

These are only some of the items contained in our August 9 discovery requests to which we have had no meaningful response from the government. We, of course, incorporate by reference herein any requests made in our August 9 letter or at any other time that you have not addressed.

In order to avoid the need to file discovery motions

(and a request for a bill of particulars) with the Court, we need to know the government's position with respect to our requests, and to be provided with the discovery that has so far been denied us. Accordingly, we would appreciate a response to our discovery requests well in advance of October 2, so as to avoid the need for an extension of time within which to file discovery motions.

Sincerely yours,

/s/ Debra Ornstein
Debra Ornstein

DO: cb

Exhibit C

September 22, 1995

BY FACSIMILE AND MAIL

Richard C. Kay, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office for the
District of Maryland
820 United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: United States v. Philip Manglitz, No. S-95-0314

Dear Richard:

This letter addresses some of the points in your letter of September 19, which responded to our September 14 letter regarding discovery.

Your letter invites us to contact you regarding any concerns we have regarding Brady, Giglio, Jencks, 404 (b) and Rule 16 discovery so that the government can address them. However, our letters of September 14, August 21, and our August 9 letter initially requesting discovery have done

precisely that. Each of our letters sets forth our discovery concerns in detail, and we repeatedly have requested that you respond point by point to the issues raised in those letters. Quite frankly, we do not understand why you have refused to state the government's position regarding our various requests. We therefore again ask that you respond to our requests so that we can avoid burdening the court with what may be unnecessary discovery motions. For example, we would not want to file a request for a bill of particulars seeking the names of unindicted co-conspirators if you are planning to provide us with that information.

From your letter, it appears that your position is that the government has produced all Brady and Rule 16 material to the defense. Please confirm whether this is the case. Your letter states that no Brady, Jenck, Giglio or Rule 16 materials known to the government were among the materials returned to Ayersman, Carter, Garufi and others. Were these materials personally reviewed by you to determine whether they contained any Brady or other discovery material to which we are entitled, or was this a determination made by DEA and/or IRS? Similarly, have you reviewed materials that may be in the possession of the Howard County police for Brady and other discovery material? Please advise us accordingly.

You presume that we have access to the documents of Mr. Manglitz's partner, Ronald Carter. We have no such access. After we receive the Form 48a's from Agent Forletta, we will contact you to arrange for us to review the materials

released to Carter and others.

Finally, on page 2, paragraph 5 of your letter you state that you "believe" that Adam Hoffinger "acknowledged" that "the only real issue for trial is whether (our) client knew the source of the cash he took from Ayersman and Kleberg." We are not aware of any such acknowledgment, oral or written, and do not know why you included this in your letter.

One housekeeping note. It just came to my attention that one of the audiotapes provided to us by DEA, N-88, is blank. The transcript for N-88 indicates that N-88 is a tape of a conversation between Messrs. Manglitz and Kleberg on February 23, 1995. In addition, audiotape N-84, which according to the transcript is a tape of a conversation between Messrs. Manglitz and Kleberg on February 28, 1995 is inaudible. Please furnish us with audible copies of these two tapes at your earliest convenience.

Sincerely yours,

/s/ Debra Ornstein
Debra Ornstein

DO: cb

October 3, 1995

LETTER TO COUNSEL

Re: United States v. Manglitz, Crim. No. S 95-0314

Dear Counsel:

I am in receipt of a number of motions filed recently by the defendant. I should like the Government to respond to the motion to suppress and the motion concerning grand jury testimony. The remaining motions are summarily denied, as indicated below:

1. Motion for a Bill of Particulars -- denied because the indictment adequately informs as to the offense, in light of other available information.
2. Motion for early disclosure of Jencks and Giglio material-- denied because the Government's agreement to furnish the material before trial is adequate in the circumstances.
3. Motion for pre-trial ruling on co-conspirator statements -- denied because the usual practice in this Court, which is quite adequate here, is for the Court to rule when the testimony is presented.

4. Motion for production of Brady material -- denied because the prosecution in this District well knows its Brady obligations, and there is no need to order the detailed steps requested.

5. Motion to order withdrawal of lis pendens notices -- denied because it borders on the frivolous, in that the Government has not only every right to file such a notice to protect its putative claims, but also a duty to do so to protect such claims and to protect potential buyers. Such filing does not amount to a taking of property so as to invoke the compensation clause or the due process clause, or any other constitutional provision.

Although informal, this letter is an Order of Court.

Very truly yours,

/s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

FNS/fns
cc: Court File -- Original
Addressees

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

UNITED STATES OF AMERICA	)	
v.	)	Criminal No.
	)	B-95-0314
PHILIP MANGLITZ,	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO EXCLUDE EXTRINSIC ACT EVIDENCE

Defendant, Philip Manglitz, moves this Court to exclude evidence regarding a twenty-three year old prior conviction and other unspecified extrinsic act evidence for which the Government has refused to provide the required notice under Federal Rule of Evidence 404(b). The grounds for this motion, which are set forth more fully in the accompanying memorandum in support hereof, are that such evidence is inadmissible under Rules 404(b) and 403. A proposed order also accompanies this motion.

Respectfully submitted,
/s/ Adam S. Hoffinger
David J Curtin
Adam S. Hoffinger

Debra Ornstein
SCHWALB, DONNENFELD, BRAY
& SILBERT, P.C.
1025 Thomas Jefferson Street, N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910

Counsel for Defendant Philip Manglitz

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

UNITED STATES OF AMERICA	)	
v.	)	Criminal No.
	)	B-95-0314
PHILIP MANGLITZ,	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT 0F DEFENDANT'S
MOTION TO EXCLUDE EXTRINSIC ACT EVIDENCE

INTRODUCTION

This motion seeks to exclude (1) evidence regarding a twenty-three year old prior conviction that is unrelated to the conduct charged in the indictment; and (2) other unspecified extrinsic act evidence, for which the Government has refused to provide the required notice under Rule 404(b). This is classic "propensity" evidence, which is inadmissible under Federal Rules of Evidence 404(b) and 403.

As early as August 9, 1995 Mr. Manglitz requested notice of whether the Government intends to present Rule 404(b) evidence at trial. This request was reiterated on

November 30, 1995. On December 1, 1995 the Government provided only the following response:

> As to 404(b) evidence, at this time the government intends to introduce evidence of your client's heroin, cocaine, and marijuana trafficking activities in the 1970s and early 1980s, and evidence that Manglitz conducted real estate transactions with drug proceeds in the late 1970s. Also, because the government intends to introduce the tapes and transcripts that have been provided to you, you should assume that any uncharged misconduct that is revealed in the tapes will be introduced as well.

December 1, 1995 Letter from AUSA Kay to D. Ornstein (Attachment A hereto). Despite additional requests by counsel for Mr. Manglitz, the Government refused to provide further notice regarding the Rule 404 (b) evidence that it intends to present at trial. See December 22, 1995 Letter from A. Hoffinger to AUSA Kay (Attachment B hereto) , and December 29, 1995 letter f rom A. Hoffinger to AUSA Kay (Attachment C hereto).[1] The Government also refused to redact certain portions of tapes it intends to offer which

---

[1]Last Thursday, January 4, 1996, Mr. Kay informed us in a telephone conversation that he was not going to provide additional notice, and that we should proceed with our motion.

purportedly refer to uncharged misconduct. See December 28, 1995 letter from AUSA Kay to A. Hoffinger (Attachment D hereto) (the transcript portions that the Government has refused to redact are attached hereto as Exhibit E).

The prosecutor's "notice" -- which does not comply with the requirements of Rule 404(b) makes no effort to identify or describe each alleged "bad act" for which the Government will offer evidence, or even disclose the specific purpose among those listed in Rule 404(b) for which such evidence will be offered. Notwithstanding, based on the prosecutor's December 1 letter and his refusal to redact certain portions of the tapes and transcripts (in which, for example, Mr. Manglitz refers to hi s prior drug-related conviction and to himself as an "ex-drug dealer") (see Exhibit E), we presume that the Government intends to present evidence of a 1972 conviction for unlawful importation of drugs.[2] Apart from this conviction, and the tape portions which the

---

[2]According to a criminal record sheet produced by the Government (attached hereto as Exhibit F), Mr. Manglitz was convicted in 1972, when he was twenty-four years old, of unlawful importation of marijuana, unlawful possession with intent to distribute marijuana, and unlawful importation of one gram of heroin, for which he received a suspended sentence and probation. According to that criminal record sheet, Mr. Manglitz also was convicted in 1984 of making and subscribing to a false income tax return. The Government has not indicated whether it intends to offer evidence of this tax conviction. It is similarly stale, remote and clearly unrelated to the indictment in this case, which does not charge any tax violations.

Government has refused to redact, we cannot presume to know what further Rule 404(b) evidence the Government might offer at trial. We also cannot presume to know what the Government means by other drug-related activities "in the 1970s and early 1980s" or "real estate transactions with drug proceeds in the late 1970s."

In any event, all such evidence -- the conviction and the other unspecified extrinsic acts referred to in the Government's December 1, 1995 letter -- is inadmissible. It is highly prejudicial, completely unrelated to the events charged in the indictment, exceptionally stale and remote.

ARGUMENT

"The Government may not use evidence of misdeeds long past to prove that the defendant committed the crimes with which he is now charged." United States v. Davis, 657 F.2d 637, 639-40 (4th Cir. 1981). Yet that is precisely what the Government is attempting to do in this case.

A. The Evidence is Inadmissible under Rule 404(b)

Under Rule 404 (b), evidence of "other crimes, wrongs, or acts" admissible if it is "(1) relevant to an issue other than character; (2) necessary; and (3) reliable." United States v. Rawle, 845 F. 2d 1244, 1247 n. 3 (4th Cir. 1988) . "[Rule 404 (b)] and the exceptions should be considered with

meticulous regard to the facts of each case." United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992) (quoting United States v. Baldivid, 465 F.2d 1277, 1290 (4th Cir.), cert. denied, 409 U.S. 1047 (1972)). The evidence which it appears the Government intends to offer in its case-in-chief does not satisfy any prong of this test.

In order for extrinsic act evidence to be "relevant to an issue other than character," it must be "sufficiently related to the charged offense." Rawle, 845 F.2d 1244 at n.3. See also United States v. Robinson, 978 F.2d 1554, 1559 (10th Cir. 1992), cert. denied, 113 S. Ct. 1855 (1993) ("There must be a clear and logical connection between the earlier offense or misconduct and the case being tried. A lack of clear association between the purported purpose for introduction of the evidence which it appears and the act itself renders the past conviction irrelevant, highly prejudicial and inadmissible"). "Where such acts are sufficiently related, the relevance of the evidence derives from the defendant's having possessed the same state of mind in the commission of both the extrinsic act evidence and the charged offense.'" United States v. Mark, 943 F.2d 444, 447 (4th Cir. 1991) (quoting United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982)

Extrinsic act evidence is "necessary" only if it is "an essential part of the crimes on trial" or where it "furnishes part of the context of the crime." Rawle, 845 F.2d at 1247 (citations omitted). Furthermore, "[n]ecessity must be appraised in light of other evidence available to the

government." United States v. DiZeno, 500 F.2d 263, 266 (4th Cir. 1974).

Indeed, evidence of a defendant's prior conviction warrants particular caution. A defendant's quilt must be determined based on proof of the particular offense charged in the indictment, not his criminal history. United States v. Betts, 16 F.3d 748, 760 (7th Cir. 1994); United States v Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985). "Erroneous admission of a defendant's prior conviction normally warrants a new trial." United States v. Figueroa, 618 F.2d 934, 944 (2d Cir. 1980) (in prosecution for conspiracy to possess and distribute heroin, admission of evidence of prior narcotics conviction was reversible error).

Here, the prosecutor has not articulated a permissible purpose for which the extrinsic act evidence will be offered. No logical, plausible inference can be drawn from the prior conviction.[3] It occurred twenty-three years ago, was

---

[3]See Hernandez, 975 F.2d at 1039 (evidence that defendant had a recipe for cooking crack cocaine and had sold it in New York was not relevant to anything about defendant's mental state during alleged conspiracy to distribute cocaine in the District of Columbia); United States v. Robertson, 15 F.3d 862, 871 n.6 (9th Cir. 1994), rev'd on other grounds, 115 S. Ct. 1732 (1995) (evidence of prior drug use is ordinarily not relevant under Rule 404 (b) to prove conspiracy and possession with intent to distribute narcotics); United States v. Hill, 953 F.2d 452, 456-58 (9th Cir. 1991) (same); United States v. Moorehead, 57 F.3d 875, 898-89 (9th Cir. 1995) (reversible error to admit evidence that defendant was a drug dealer in prosecution for possession of firearm;

completely unrelated to the charged offense, did not involve any of the persons with whom Mr. Manglitz is charged to have conspired or transacted business in this case, and has no bearing on any material issue in this case.[4]

Indeed, the remoteness of this prior conviction further diminishes any reliability or probative value that it might

---

impermissible inference that because drug dealer, more likely to possess a gun and more likely to possess this gun).

[4]The Government also has indicated that it intends to introduce extrinsic act evidence during its case-in-chief. This creates a substantial risk that such evidence either will not be relevant to prove a material issue or will not be necessary. See United States v. Hadaway, 681 F.2d 214, 218 (4th Cir. 1982) ("The risk of permitting evidence to come in as part of the prosecution's case is that it might be followed by additional evidence that would establish [an element of the crime] beyond a reasonable doubt. In such a case, if other elements of the crime were in doubt, admission of the evidence of other crimes might in the end prove not only quite unnecessary but highly prejudicial as well.") For this reason, some courts have suggested that the Government defer presentation of its Rule 404(b) evidence. See e.g. United States v. Benedetto, 571 F.2d 124 , 6, 1251 (2d Cir. 1978) ("[W]e have emphasized that-admission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case, since the court will then be in the best position to balance the probative worth of, and the Government's need for, such testimony against the prejudice to the defendant"). The Government's extrinsic act evidence is inadmissible under both Rules 404(b) and 403, and should be excluded. However, in the alternative, and at the very least, this Court should require the Government to defer presenting that evidence in its case-in-chief.

otherwise have. In United States v. Davis, 657 F.2d 637, 639 (4th Cir. 1981), in which defendant was charged with conspiracy to distribute heroin and other offenses, testimony concerning alleged sales of heroin made by the defendant six to eleven years before the charged conspiracy was held inadmissible under Rule 404 (b). See also United States v. Aguilar-Aranceta, 58 F.3d 796 (1st Cir. 1995) (conviction reversed; four-year period between prior conviction and events leading to charges "bears directly on the probative weight of prior conviction"); United States v. Gomez, 879 F.2d 256 (7th Cir. 1989) (three-year old conviction inadmissible), cert. denied, 493 U.S. 1033 (1990); United States v. Johnson, 879 F.2d 331 (8th Cir. 1989) (evidence of six-year old incident was too remote). In this case, the prior conviction is twenty-three years old, far more remote in time than in any of the above-cited cases in which more recent convictions were held inadmissible. Moreover, the fact that Mr. Manglitz, who is now forty-nine years old and has sole custody of his two children aged six years old and eight years old, was twenty-four years old at the time of his prior conviction also indicates the limited reliability and unfairness of admitting such evidence.

The prosecutor's failure to provide adequate Rule 404(b) notice makes it difficult to address the other, unidentified extrinsic acts that the Government apparently intends to present at trial. In fact, the inadequate notice provided in this case is an independent ground for exclusion

of such evidence. See Notes of Advisory committee on 1991 Amendment to Rule 404(b) ("[T]he offered evidence is inadmissible if the court determines that the notice requirement has not been met.")[5] Regardless of the adequacy of the notice, such evidence is likewise too remote (dating from the late 1970s) and unrelated to the charged offense.

B. The Evidence is Inadmissible Under Rule 403

Even if the evidence the Government intends to offer could pass the test for admissibility under Rule 404(b), it would still be inadmissible unless its probative value outweighed the danger of undue prejudice to the defendant. See Fed. R. Evid. 403; United states v. Hernandez, 975 F.2d 1035, 1041 (4th Cir. 1992); Rawle, 845 F.2d at 1247. The Government's intended evidence fails this test as well.

The prior conviction is highly prejudicial. See United States v. Gilliland, 586 F.2d 1384, 1389 (10th Cir. 1978) ("[O]nce prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury."); Daniels, 770 F.2d at 1118 ("[O]nce evidence of prior crimes

---

[5]A notice containing only generalized references to various bad acts does not provide sufficient detail to comply with Rule 404 (b) United States v. Carter, 1995 U.S. Dist. LEXIS 11597 (N.D. Ill. Aug. 11, 1995).

reaches the jury, 'it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.'") (citations omitted).

Moreover, extrinsic act evidence is particularly prejudicial where, as in this case, it connects a party with "a highly charged issue, such as narcotics." United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) (reversing conviction; prejudicial effect of prior drug-related activity outweighed probative value) See also United States v. Ore ira, 29 F.3d 185 (5th Cir. 1994) (extrinsic act evidence "injecting specter of narcotics trafficking into the case's was unduly prejudicial).

Whatever minimal value this extremely remote, and unrelated extrinsic act evidence might have is substantially outweighed by the danger of unfair prejudice to Mr. Manglitz. See Hernandez, 975 F.2d at 1041 (in prosecution for conspiracy to distribute cocaine in the District of Columbia, admission of evidence that defendant had a recipe for cooking crack cocaine and had sold it in New York was error; balance between prejudicial effect and probative value was "one-sided"). The Government, through introduction of the twenty-three year-old conviction and other unspecified drug-related activities "in the 1970s and early 1980s," simply wants the jury to know that Mr. Manglitz had involvement with drugs in the distant past. The most likely effect, and the obvious purpose, of presenting such evidence would be to

suggest the forbidden inference: that Mr. Manglitz is a person with a propensity to engage in criminal behavior. Accordingly, this evidence must be excluded.

CONCLUSION

For the foregoing reasons, Mr. Manglitz respectfully requests that the Court grant the motion and exclude the extrinsic act evidence that the Government intends to offer at trial.

Respectfully submitted,

/s/ Adam S. Hoffinger
David J. Curtin
Adam S. Hoffinger
Debra Ornstein
SCHWALB, DONNENFELD, BRAY & SILBERT, P.C.
1025 Thomas Jefferson Street, N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910
Counsel for Defendant Philip Manglitz

December 1, 1995

Debra Ornstein, Esquire
Suite 300 East
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007-5207

Re: United States v. Manglitz
Criminal No. S-95-0314

Dear Ms. Ornstein:

Your letter dated November 30, 1995, indicates that you would like to review all of the materials that have been returned to Ayersman, Kleberg, and Carter. This request is unreasonable. We will accommodate any reasonable request for specific items, but we will not retrieve all of the released materials.

Enclosed are copies of DEA reports about the searches of Carter's residence, Kleberg's residence, Garufi's residence, Ayersman's residence, and the Bushey Park Road farm. Perhaps these reports will help you to decide what specific items you would like to examine.

Also enclosed is another copy of your client's criminal record. A copy was provided to Mr. Hoffinger at the Manglitz arraignment. Because copies of other items were mailed to Mr. Hoffinger before he transferred the case to you,

you might want to check with him to see if he has other materials that he did not give you.

As to 404(b) evidence, at this time the government intends to introduce evidence of your client's heroin, cocaine, and marijuana trafficking activities in the 1970's and early 1980's, and evidence that Manglitz conducted real estate transactions with drug proceeds in the late 1970's. Also, because the government intends to introduce the tapes and transcripts that have been provided to you, you should assume that any uncharged misconduct that is revealed in the tapes will be introduced as well. If you have any objections to introduction of any material on the tapes, please let me know well before trial so that we can discuss them.

Very truly yours,

Lynne A. Battaglia
United States Attorney

/s/ Richard C. Kay
Richard E. Kay
Assistant United States Attorney

Enclosures

Exhibit B

December 22, 1995

Richard C. Kay, Esq.
Assistant United States Attorney
604 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

Re: United States v. Manglitz, Criminal No S-95-0314

Dear Richard:

This is in response to the statements in your December 1, 1995 letter to Debra Ornstein regarding the Government's intention to introduce Rule 404(b) evidence against Mr. Manglitz.

It is not clear -- especially in light of the "at this time" qualification -- whether you intend your letter to serve as the notice required under Rule 404(b). If the letter is not your Rule 404(b) notice, please provide your notice immediately. If the letter is your notice, it is inadequate. See United States v. Carter, 1995 U.S. Dist. LEXIS 11597 (N.D. Ill. Aug. 11, 1995) (Government's notice containing generalized references to various bad acts did not provide sufficient detail). For example, you state that we should assume "any uncharged

misconduct that is revealed in the tapes will be introduced at trial[.]" You also make vague reference to drug related activities in the "1970's and early 1980's." You must provide sufficient detail so that, prior to trial, a Court can rule on the admissibility of the Rule 404(b) evidence that you intend to introduce against Mr. Manglitz. See United States v. Long 814 F. Supp. 72 (D. Kan. 1993).

Accordingly, we request that, at a minimum, you describe each alleged "bad act" that you intend to introduce, the approximate date of each such act, the specific purpose (among those listed in Rule 404(b)) for which you intend to introduce each such act at trial, and the manner in which you intend to prove each act. Since we may need to move in limine to exclude any or all of the "bad acts" evidence you will seek to introduce, we would very much appreciate if you would provide the requisite 404 (b) notice as soon as possible.

Your December 1 letter also states that the Government intends to introduce at trial the tapes and transcripts that you have provided to us. Since we asked for the "final" tapes and transcripts prior to your December 1 letter, and have received none, we assume that you intend the tapes and transcripts produced to us to be the "final" ones. If this assumption is incorrect please so advise us and produce the "final" tapes and transcripts immediately.

In the meantime, pursuant to your request in the last sentence your December 1 letter, we have enclosed copies of the government transcripts on which we have indicated

portions that should be redacted under Rules 403, 404 (b), and because they are irrelevant, hearsay, prejudicial and inflammatory, among other reasons.* We of course object to the introduction of any and evidence of uncharged misconduct, in the tapes and anywhere else, and reserve our right to make any further objections that we deem appropriate. Please let us know as soon as possible whether will agree to our proposed redactions.

Sincerely yours,

/s/ Adam S. Hoffinger
Adam S. Hoffinger

Enclosures

---

*The following are the transcripts and the bates-stamped pages on which the requested redactions appear:

Exhibit N-60, January 5, 1995, page G000005

Exhibit N-60, January 13, 1995, pages G000010, 13, 14, 16, 19, 21, 27, 29, 32, 35, 36, 44, 43, 46

Exhibit N-63, January 17, 1995, pages G000060, 61, 62, 65, 66

Exhibit N-78, January 25, 1995, page G000074

Exhibit N-79, February 8, 1995, pages G000080, 82, 85, 86, 89

Exhibit N-92, February 27, 1995, page G000160, 161

Exhibit C

December 29, 1995

Richard Kay, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
District of Maryland, Northern Division
604 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

Re: United States v. Manglitz, Crim. No. S-95-0314

Dear Richard:

Today I received your letter dated December 28, 1995 regarding the tape and transcript redactions proposed in my letter dated December 22, 1995. Please be advised that we do object to the admission of tapes and transcripts without all of

the redactions that you rejected in your letter. (G000005, 13, 14, 32, 60, 61, 85, 86, 89, 160) Those redactions relate to prior conduct by Mr. Manglitz that is as much as twenty-three years old.[1] Considering the age and remoteness of the conduct, among other factors, this evidence should not be admissible under any circumstances and certainly not on the government's direct case.

We hope you will reconsider making those redactions which you rejected in your letter. At the very least, perhaps you will agree not to seek admission of the other crimes, evidence on the government's direct case, so we can avoid burdening the court with a motion now. Otherwise, we will have no choice but to move the court prior to trial.

In the meantime, we would appreciate if you would send us your proposed final transcripts and tapes. Also, you have not responded to the request in my December 22 letter for proper Rule 404(b) notice. We would appreciate your response as soon as possible so that we can move the court, if necessary, in advance of trial.

---

[1]For example, according to the criminal record you produced to us, Mr. Manglitz was charged and convicted in 1972 of unlawful importation of marijuana, unlawful possession with intent to distribute marijuana, and unlawful importation of one gram of heroin, for which he received a suspended sentence and probation.

Sincerely yours,

/s/ Adam Hoffinger
Adam S. Hoffinger

ASH/je

Exhibit D

December 28, 1995

Adam S. Hoffinger, Esquire
Suite 300 East
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007-5207

Re: United States v. Manglitz
Criminal No. S-95-0314

Dear Mr. Hoffinger:

I have reviewed the tape and transcript redactions that you requested in your letter dated December 22, 1995, and will make most of the redactions that you requested. I do not intend to make the changes that you requested as shown on the pages with the following bates-stamped numbers: G000005, 13, 14, 32, 60, 61 (okay to strike down to "Toothbrush, and . ."), 85, 86, 89, 160 (okay to strike from "Manglitz: (Inaudible) . . . ex-wife, Jocelyn . . ." down to the bottom of the page and also the continuation on page 161).

As you requested, I am providing this response promptly. Because you also requested copies of tapes and transcripts in final form "immediately," please advise me if you intend to take your remaining redaction requests to the

Court. If I do not hear from you soon, I will assume that you do not object to the admission of the tapes and transcripts as modified above.

Very truly yours,

Lynne A. Battaglia
United States Attorney

/s/ Richard C. Kay
Richard C. Kay
Assistant United States Attorney

Exhibit E

* * * *(G000005)

MANGLITZ: HEY, I'M NOT UH TOTALLY CLEAN YOU KNOW, I'VE GOT A PAST, IT'S A PAST...

KLEBERG: YEAH, YOU'VE GOTTA A PAST...

MANGLITZ: (UNINTELLIGIBLE-METER 077) GLENWOOD, GLENWOOD SPRINGS POPS UP AND, AND SCOTTY TELLS ANY MORE TALES, I MEAN, I'M, I POP UP WITH RED FLAGS BUT...

KLEBERG: HEY, WHAT, WHICH SCOTTY?

MANGLITZ: WHAT?

KLEBERG: WHAT SCOTTY?

MANGLITZ: YOU DON'T KNOW THE WHOLE STORY?

KLEBERG: UH UH

MANGLITZ: YOU GOT TO BE KIDDING, AH I HEARD THE WHOLE STORY, YOU GOT A MINUTE

KLEBERG: WELL, YEAH

MANGLITZ: IS IT A COLD PAY PHONE

KLEBERG: YEAH, I MEAN, I'M HEAR IN NORDSTROMS

MANGLITZ: LET'S SEE, SCOTTY MARRIED THE GIRL

KLEBERG: OH, YOU MEAN OVER AT GARUFI'S FRIEND SCOTTY. . .

MANGLITZ: HE'S THE ONE WHO DID ALL THE TALKING. .

KLEBERG: OH MANGLITZ: YOU DIDN'T KNOW THAT

KLEBERG: NO MANGLITZ: OH SHIT, HERE'S WHAT HAPPENED, YOU READY FOR A QUICK SYNOPSIS

KLEBERG: UH HUH MANGLITZ: SCOTTY MARRIED THE GIRL THAT BROKE INTO GARUFI'S HOUSE

KLEBERG: UH HUH

MANGLITZ: SO HERE, BEFORE SHE GETS SENTENCED, HE'S TRYING TO GET HER OFF, SO HE MAKES THIS BIG TALE UP ABOUT HOW GRUFIES A BIG DEALER...

KLEBERG: UH HUH

MANGLITZ: RIGHT, AND RANDY'S A BIG DEALER...

KLEBERG: UH HUH

MANGLITZ: SO, THEY START, THEY, A WEEK BEFORE CHRISTMAS, THEY GO INTO GARUFI'S HOUSE, DEA...

KLEBERG: UH HUH

MANGLITZ: SEARCH IT TOP TO BOTTOM, FIND NOTHING

KLEBERG: WHAT DO YOU MEAN, THIS, YOU MEAN, THE SAME DAY THAT WE ALL GOT HIT...

MANGLITZ: YEAH, AND THEY WERE WATCHING THE FARM HOUSE FOR A WEEK, AND JUST BY COINCIDENCE A LOAD SHOWS UP THERE...

KLEBERG: UH HUH

MANGLITZ: RIGHT AND UHM, SO SCOTTY'S ON THE MARK, AND THEY BELIEVE SCOTTY RIGHT, CAUSE HE SAID THERE WAS THIS BIG ONGOING CONSPIRACY, AND THEY SAW YOU TAKE THREE POUNDS OUT OF THE TRUCK, TAKE IT TO YOUR HOUSE, THEY FOLLOWED YOU TO YOUR HOUSE, THAT'S HOW THEY GOT YOU.

KLEBERG: OH, YOU MEAN FRIDAY NIGHT, WHEN I LEFT RANDY'S HOUSE AND ALL

MANGLITZ: WATCHING THE FARM, FROM WHAT SCOTTY SAYS

KLEBERG: UH HUH

* * * *(G000013)

KLEBERG: Well they want me to come in and talk.

MANGLITZ: I know.

KLEBERG: And...

MANGLITZ: They want Randy to too, but Randy says he

just can't, he's you know, he can't talk about anything.

KLEBERG: Huh, huh.

MANGLITZ: I mean they caught him with a bunch of pot and ah, he's just going to suffer the penalty, I'm sure they put a maximum amount of pressure you . .

. . . and ah let me tell you my experience Dana. Twelve years ago, they were putting the piece of the puzzle together and they wanted me to come in and talk.

KLEBERG: Huh, huh.

MANGLITZ: And I could see if I came in and talked I could. . .

KLEBERG: Is this what your telling me earlier, the pressure that you were under.

MANGLITZ: Yeah, I was under this kind of pressure.

KLEBERG: This was back in like 82 94 83.

MANGLITZ: 82 or 82, and if I went in and talked, I could name like four names, each of these guys would serve five to ten years.

KLEBERG: Hum, huh.

Phil: And I'd get off.

KLEBERG: Hmm, huh.

MANGLITZ: But instead, I just swallowed hard, and took what, what, what they could give me. . . .

KLEBERG: Huh, huh.

MANGLITZ: And I served eight months and two weeks.

KLEBERG: Huh, huh.

(G000014)

MANGLITZ: And it, it was way better than, I, I chose the right path in the end.

KLEBERG: Hmm, huh.

MANGLITZ: Cause it was better that putting, trying, to live around in the same area, with those ah, with those fuckers with their families under it.

KLEBERG: Huh, yeah I mean I'm sure if people would threaten you and stuff like that.

MANGLITZ: And if I didn't talk, I didn't, I, . . . I could keep my money, hide it, but when, If I had talked, they wanted to know everything about everybody, my whole life and how much I made.

KLEBERG: Hmm, huh.

MANGLITZ: And, and the IRS can come into play, all that bullshit stuff. I made the right decision.

KLEBERG: Huh, huh.

MANGLITZ: And it seems like .....

KLEBERG: (Inaudible).

MANGLITZ: .... If Randy's going to die hard with that, with that big load, ah,.....

KLEBERG: So Randy thinks he can get away with five

years?

MANGLITZ: No, Randy doesn't know what he can got away with, but he knows that, ah, that if he, ah, if he hangs tough with this one load, instead of lots more charges, he's willing to do that.

KLEBERG: Hmm, huh.

MANGLITZ: He's willing to do that (Inaudible)

KLEBERG: And, and Fuzzy he thinks Fuzzy and Wilbur can, kind of, get out of it? or .....

MANGLITZ: He thinks that if he accepts the responsibility of it, that, that's what's going to happen.

KLEBERG: Hmm, huh.

* * * * (G000032)

KLEBERG: Hm, You.....

MANGLITZ: And Scottie all fantasy man, about everything so ---

KLEBERG: OK.

MANGLITZ: So it would be great if you guys could f ight ---unintelligible ------ You know what? Never been in trouble before, you know you gotta drop on -----unintelligible ------ probation for it time I don't know what your lawyer tells you but.

KLEBERG: Well

MANGLITZ: That's that what happened to me in the 70's. You know, I got caught with fifty pounds in the 70's.

KLEBERG: Was that down on the border.

MANGLITZ: Yeah, I got probation, five years probation, don't do it again.

KLEBERG: Yeah, well, things are a little tighter these days then they were back then.

MANGLITZ: Yeah, that's true.

KLEBERG: Back then you could get away with quite a bit.

KLEBERG: But the border's a lot more laxed.

KLEBERG: Well anyway.

MANGLITZ: How do you like my van.

KLEBERG: Its pretty.

MANGLITZ: ------ unintelligible ------ interior lights - ------ unintelligible ------ There are on a reostat, dial em down.

KLEBERG: Ah. yeah.

MANGLITZ: I want got some little Christmas lights. I got a tv, and Nintendo, I got a video recorder here I got a ....

KLEBERG: You need to go somewhere in this sonavabitch.

MANGLITZ: That's a bed Dana.

KLEBERG: Yeah.

MANGLITZ: Push that little button over there it folds down * * * * (G000060)

KLEBERG: WELL I YOU KNOW, I, I'VE NEVER BEEN, YOU KNOW RAVING THAT BIG PILE OF CASH ALL THESE YEARS AND I REALLY DON'T HAVE ANY IDEAS, I MEAN, IT WOULD BE NICE IF I ENDED UP GOING TO JAIL FOR A COUPLE OF YEARS OR SOMETHING THAT I'D HAVE SOMETHING PUT AWAY THAT YOU KNOW, INSTEAD OF IT JUST SITTING THERE IT WOULD DO SOMETHING.

MANGLITZ: DANA, YOU WERE CAUGHT WITH 3 ½ POUNDS.

KLEBERG: THREE A LITTLE OVER THREE POUNDS

MANGLITZ: YOU KNOW WHAT I WAS CAUGHT WITH, FIFTY POUNDS. DOWN AT THE BORDER, NEAR LOREDO RIGHT? THOUSAND DOLLAR FINE, FIVE YEARS PROBATION.

KLEBERG: WELL IT WAS TWENTY YEARS AGO TOO. I DON'T KNOW IF THEIR A LITTLE, THEIR A LITTLE MORE. . . .

MANGLITZ: OKAY, YOU CAN AH, YOU CAN AH,

YOU CAN LOOK AT EVERYTHING LIKE ITS THE WORSE, AND THATS THE WAY THEY WANT YOU TO LOOK AT IT, LIKE YOUR GOING DOWN THE RIVER FOREVER, BUT, BUT 3 ½ POUNDS IS NOTHING TO A GET CAUGHT WITH, IT CAN JUST BARELY, JUST BARELY TOUCHES DISTRIBUTION YOU KNOW, YOU NIGHT DISTRIBUTE IT. YOU KNOW, AND WHO. WHO YOU DISTRIBUTING TO. THEY GOT NOBODY THAT COULD SAY, YEAH, HE SOLD ME AH, AH, YOU KNOW, FIVE POUNDS A WEEK FOR FIVE YEARS. THEN YOUR IN A CRIMINAL SITUATION. YOU GOT NOTHING, YOU KNOW, THIS WAS YOUR PRIVATE STASH YOU GET ONCE A YEAR OR SOMETHING.

KLEBERG: WELL YOU KNOW IT WAS GOOD SEEING RANDY. IT WAS GOOD TO HEAR WHATS UP WITH HIM, CAUSE OBVIOUSLY I'VE BEEN WONDERING AND FOR THE FIRST COUPLE OF WEEKS I WAS LIKE PARALIZED, YOU KNOW? I WAS AFRAID TO MOVE, AND ON TOP OF THAT, BEING SICK AND I KIND OF GOT SICK AGAIN, I'M FEELING

A LITTLE BETTER BETTER TODAY. UHM.

MANGLITZ: DON'T GIVE ME YOUR COLD, OKAY?

KLEBERG: OKAY.

MANGLITZ: I AIN'T GOING TO ACAPULCO SICK.

KLEBERG: WELL I GOT..

MANGLITZ: DO YOU WANT THAT TO HAPPEN?

KLEBERG: WELL I GOT AN ANTIBIOTIC'S AND STUFF YESTERDAY, SO... AND I ACTUALLY SLEPT OKAY LAST NIGHT, SO....

MANGLITZ: WELL DANA, I TOLD RANDY THIS AND I TELL YOU THIS, IF YOU GUYS COME THROUGH STAND UP GUYS, RIGHT, AND YOU DON'T ROLL OVER, I'M GONNA BEND OVER BACKWARDS TO HELP YOU DO WHATEVER YOU WANNA DO, HELP YOU DO WHATEVER IT TAKES, OKAY? SO IF AH, IF YOU WERE GONNA GO AWAY FOR A YEAR, TWO YEARS, I DON'T THINK IT'S GOING TO HAPPEN WITH 3 ½ POUNDS-.

KLEBERG: WELL ITS A POSSIBILITY.

MANGLITZ: IT IS, BUT I DON'T THINK THERE IS, BUT IF YOU WERE, I'D WORK SOMETHING OUT TO AH, AH, BORROW MONEY FROM YOU, AND PAY

INTEREST ON IT, OKAY? LEGAL PAPERWORK AND STUFF LIKE THAT YOU CAN PUT AWAY AND WATCH YOUR MONEY GROW AS YOUR SITTING FAT CAT I'LL SEND (G000061) YOU MONEY WHILE YOUR IN THERE YOU KNOW

WHEN I WAS IN, I SERVED UM -- I GOT THREE YEARS AND I SERVED 8 MONTHS AND 2 WEEKS, AND THEN GOT A 6 MONTH HALF-WAY HOUSE, SO I DIDN'T EVEN SERVE HALF MY TIME YOU KNOW, EVEN IF I ADD THE HALF-WAY HOUSE.

KLEBERG: YEAH.

MANGLITZ: SO, AH- WHAT'S THE POINT I'M TRYING TO MAKE? OH, YEAH WHEN I WAS IN THERE, YOU NEED A CONNECTION ON THE OUTSIDE TO SEND YOU MONEY SO YOU CAN BUY COKES AND COOKIES, ALL THE STUFF YOU WANT, YOU KNOW. . .

KLEBERG: TOOTHBRUSH, AND. . .

MANGLITZ: EVERYTHING, YOU CAN BUY SNEAKERS WHILE YOU'RE IN THERE WHEN YOUR SNEAKERS WEAR OUT. ALL SORTS OF THINGS, SO- SHIT, THIS GUY UP IN HAGERSTOWN WAS EVEN TELLING ME HE CAN BUY A T.V. . I SENT HIM A THOUSAND BUCKS.

KLEBERG: HMMM.

MANGLITZ: YEARS AGO WHEN, WHEN HE WENT DOWN FOR, FOR A COUPLE KEYS OF

THERE YOU KNOW. IF YOU GOT MONEY TO DRAW, MOST OF THE GUYS THAT GO IN THERE HAVE GOTTEN WIPED OUT OF EVERYTHING. THEY DON'T GOT A POT TO PISS IN, AND ALL THEY HAVE IS THE 15 CENTS AN HOUR THAT THEY- WHEN I WORKED, WE MADE

15 CENTS AN HOUR- WHAT'S THAT, 6 BUCKS A WEEK. I KNOW, IT'S VERY FUNNY. BUT FOR 6 DOLLARS A WEEK IS WHEN YOU BUTY COOKIES, AND YOUR CANDY BARS, AND YOUR APPLES, AND SHIT LIKE THAT TO LAST UNTIL THE NTEXT WEEK, SO--

KLEBERG: (LAUGHS)

MANGLITZ: IT'S PRETTY FUNNY, IT'S LIKE WORKING FOR THE MAN YOU KNOW, IN TH COAL MINES AND SHIT.

KLEBERG: UHM

MANGLITZ: ANYWAY

KLEBERG: WELL ANYWAY, YO- YOU THINK

ABOUT SOME THINGS YOU CAN DO. RANDY'S GOT THE MONEY. HE'S GOING TO HOLD ON TO IT, AND HE SAID, YOU KNOW, I CAN GET IT WHENEVER I WANT IT, AND I TOLD HIM I'M GLAD HE DIDN'T BRING IT LAST NIGHT, CAUSE I KNOW- KNOW WAY TO DO ANYTHING WITH IT. I THINK IT'S JUST BETTER WHERE IT IS. I JUST- YEAH, LIKE TO KNOW THAT IT'S OKAY AND IT'S, NOBODY'S GOT IT. HE SAID THAT, YOU KNOW THAT THEY MISSED IT WHEN THEY CAME TO THE HOUSE. YOU KNOW, THE PLACE WHERE IT WAS THEY LOOKED IN THERE AND THEY DIDN'T EVEN SEE IT. IT WAS LIKE HIDDEN BEHIND SOMETHING ELSE. AND AH...

MANGLITZ: SCHWOOO...

KLEBERG: YEAH, SCHWOO..YEAH, IT WAS HIDDEN PRETTY GOOD. AND AH, YEAH JUST AH, THERE'S SOMETHING ELSE I WANTED TO ASK YOU, IT COULDN'T HAVE BEEN THAT IMPORTANT

MANGLITZ: WELL, THE LAST TIME YOU WERE IN MY VAN, YOU BROUGHT UP ABOUT

THE DEEDS TO YOUR PROPERTY AND STUFF LIKE THAT -

KLEBERG: OH, YEAH

MANGLITZ: I DON'T KNOW, IS THAT WHAT YOU WANT TO TALK TO ME

* * * *(G000085)

MANGLTIZ: OKAY.

KLEBERG: UM AND YOU KNOW I MEAN YOU KNOW WHATEVER, I MEAN WHATEVER I GUESS WHAT WHAT Do YOU THINK ABOUT MAYBE WHAT A JUMBO CD GOES FOR OR SOMETHING LIKE THAT OR?

MANGLTIZ: NO.

KLEBERG: A LITTLE LESS.

MANGLTIZ: BETTER THAN THAT.

KLEBERG: BETTER THAN THAT.

MANGLTIZ: WHAT DOES THE JUMBO CD GO FOR.

KLEBERG: AH, SHIT YOU CAN GET THEM AT SANDY SPRING NOW SIX POINT SOMETHING.

MANGLTIZ: HOW ABOUT EIGHT.

KLEBERG: EIGHT'S FINE OH YEAH I DON'T WANT TO BE TOO GREEDY.

MANGLTIZ: RIGHT, OKAY.

KLEBERG: YOU GUYS COULD HAVE DO SOMETHING WITH IT AND UH, HOW

AM I GOING TO GET THE MONEY DO I HAVE TO GET IT FROM RANDY OR CAN YOU GET IT.

MANGLTIZ: YEAH, I'LL TRY AND GET IT WHAT I'LL DO IS I'LL SIT DOWN WITH HIM AND I'LL TELL HIM THE PLAN. THAT WE DEVISED.

KLEBERG: UH-HUH.

MANGLTIZ: THAT YOU WANT TWENTY AND AH, I'LL AH, I'LL GONNA SIGN, WILL SIGN SOME PAPERS SO WE CAN BORROW THE HUNDRED.

KLEBERG: UH HUH.

MANGLTIZ: AND YOU KNOW IF I GET AH, IF I GET YOU KNOW COMPLICATIONS.

KLEBERG: UH HUH.

MANGLTIZ: FROM DISCUSSING IT DIRECTLY WITH HIM THAT YOU'RE GOING TO HAVE TO SIT DOWN WITH HIM.

KLEBERG: OKAY ALRIGHT WELL OKAY I'LL JUST UM LIKE I SAID I HAD GOT A COUPLE OF BEEPS THAT I COULDN'T FIGURE OUT WHAT YOU WERE AND UM.

MANGLTIZ: BUT LIKE YOU SAID YOU GUYS HAVE BEEN BEST FRIENDS FOR EVER SO.

KLEBERG: YEAH OKAY.

MANGLTIZ: SO YOU NEED TO UH AIR IT OUT AND.

KLEBERG: OKAY.

MANGLTIZ: HE'S NOT THE HEAT. HE NOT AH A PROBLEM.

KLEBERG: UH-HUH.

MANGLTIZ: HE STOPS OVER AT MY HOUSE AND, AND AH TELLS ME ABOUT AH THE FUTURE HE'S FACING AND WHAT-WHAT HIS PLANS ARE, WITH KNOW IF THE HAS TO MOVE HIS WIFE, TO THE JAIL AND WE TALK ABOUT THE PERSONAL SHIT.

KLEBERG: UH-HUH.

MANGLITZ: WE DON'T TALK ABOUT AH YOU KNOW, YOU KNOW OUR PAST, BECAUSE THAT A.

KLEBERG: YEAH SURE.

MANGLITZ: TRICKY PAST. SO HE'S NOT OUT TRYING TO TRYING TO GET ME TO TALK ABOUT AH INCRIMINATING OR ANYTHING LIKE THAT.

KLEBERG: OKAY.

MANGLITZ: AND I KNOW YOU'RE NOT EITHER SO.

KLEBERG: NO.

(G000086)

MANGLTIZ: YOU GUYS COULD STILL GET TOGETHER.

KLEBERG: OKAY.

MANGLTIZ: AND BE COOL AND I GUARANTEE.

KLEBERG: I THINK THE GOOD THING IS HE DOESN'T COME BY MY HOUSE, THAT'S THE FREAKY PAST. OKAY IF I START GETTING SOME PAGES YOU'VE GOT TO GIVE ME TEN OR FIFTEEN MINUTES IF I'M IN MY HOUSE TO GO OUT, YOU KNOW.

MANGLTIZ: UH HUH.

KLEBERG: BUT I DON'T BUT BUT THE THING COMING TO MY HOUSE PART You KNOW IS THE FREAKY PART AND IF WE'RE GONNA TALK OR MEET OR WHATEVER WE SHOULD DO IT ON NEUTRAL TERRITORY AND KNOW AND IF HE PAGES ME I'LL GOT OUT TO A PAY PHONE I DON'T MAKE AND THE ONLY REASON I CALLED YOU AND LEFT A MESSAGE AT MY HOUSE YESTERDAY WAS YOU CALLED MY HOUSE IS I FIGURED YOU KNOW WHAT THE FUCK DID YOU TRY CALLING ME BACK DID YOU STAR 69 ME OR

SOMETHING BECAUSE SOMEBODY CALLED RIGHT AFTER THAT AND THEY DIDN'T LEAVE A MESSAGE.

MANGLTIZ: NOPE, I ALWAYS LEAVE A MESSAGE.

KLEBERG YEAH. OKAY.

MANGLTIZ: BECAUSE I RAVE IT WHEN SOMEONE DOES THAT TO ME.

KLEBERG: YEAH CAUSE SOMEBODY WILL SAVE IT AND I DON'T HAVE CALLER ID OR ANYTHING LIKE THAT I PROBABLY SHOULD BUT UH.

MANGLTIZ: AND WE PLAY GOLF TOGETHER AND SHIT DANA AND UH YOU BOUGHT A COUPLE OF LOTS FROM ME. THERE'S NO REASON FOR US TO SHOOT THE SHIT ON THE PHONE.

KLEBERG: NO, NO I DON'T WANT TO.

MANGLTIZ: THERE'S NO DENYING WE WENT TO ACAPULCO AND PLAYED GOLF AND HAD A GOOD TIME SO THERE'S NO REASON WHY I CAN'T GIVE A FRIEND A CALL ON THE TELEPHONE.

KLEBERG: YEAH, THAT'S TRUE.

MANGLITZ: YOU KNOW WHETHER THEY'RE TAPPING YOU LINE AND THEN, THEY SEE PHIL MANGLITZ EX-DRUG DEALER AND THEY TAP MY LINE.

KLEBERG: YEAH.

MANGLTIZ: THERE'S NO REASON FOR US TO SHOOT THE SHIT ON THE PHONE UNLESS WE GET TOGETHER FOR LUNCH AND TALK GOLF OR SOMETHING YOU KNOW.

KLEBERG: YEAH THAT'S WHAT I FIGURED TOO I WAS THINKING THAT TOO I JUST DON'T WANT TO BE IN THE POSITION OF CALLING YOU FORM MY HOUSE BECAUSE I DON'T THINK THAT LOOKS GOOD IF YOU'RE CALLING ME THAT'S ONE THING BUT IF I'M REACHING OUT TO YOU.

MANGLTIZ: UM-HUM.

KLEBERG: I - I'D LIKE TO DO IT AWAY FROM MY HOUSE.

MANGLTIZ: THAT'S FINE.

KLEBERG: THE ONLY REASON I DID IT HAT DAY IS BECAUSE YOU HAD LEFT ME A MESSAGE, YOU KNOW.

MANGLTIZ: YEAH, I'LL JUST LEAVE YO A MESSAGE, GIVE ME A CALL SOMETIME, OKAY.

KLEBERG: OKAY, ALRIGHT, SO NUMBER ONE YOU CAN MOVE MY SHIT FOR ME. NUMBER TWO, UM.

MANGLTIZ: I'LL SIT DOWN WITH RANDY IN PRIVATE CONVERSATION AND UH, I'LL TRY AND DO IT THIS EVENING. I'M PLAYING CARDS WITH THE GUYS TOMORROW EVENING BUT IF I CAN'T HOOK UP WITH HIM IT WILL BE BY FRIDAY.

* * * *(G000089)

KLEBERG: YEAH, YOU KNOW AND I SEE. AND HE'S IN THE SHIT I KNOW TEN FIFTEEN TIMES DEEPER THAN I AM. YOU KNOW HERE I HAVE THREE AND YOU HAVE 270 AND SOMETHING OR 300 AND SOMETHING.

MANGLITZ: (UNINTELLIGIBLE) OR 270 I THINK.

KLEBERG: YEAH! SOMETHING LIKE THAT, THAT'S WHAT HE TOLD ME. AND UH,

MANGLITZ: I ROUND IT UP.

KLEBERG: YOU KNOW I MEAN NOW, BY NOW I'M TRYING TO FIGURE YOU KNOW WELL IS HE CUT SOME KIND OF DEAL? IS HE GONNA BE THE ONE THAT'S WEARING WIRE. HE'S GOING TO BE THE ONE.

MANGLITZ: HE SAYS TO ME HE CAN'T CAUSE THEY'LL KILL HIS MOTHER, THEY'LL KILL ONE.

KLEBERG: THOSE MEXICANS OUT THERE?

MANGLITZ: YEAH! HE SAYS THEY'LL.

KLEBERG: PRETTY RUTHLESS.

MANGLITZ: HE'S THAT HE WAS AT HIS HOUSE ONE DAY OUT IN SAN DIEGO HIS MOTHER'S HOUSE, AND THE BIG HONCHO SHOWS UP AT HIS HOUSE AND IT WAS JUST A SYMBOL TO LET HIM KNOW THAT HE KNEW WHERE RANDY'S MOM'S HOUSE WAS.

KLEBERG: WAS THIS RECENTLY? WAS THIS THE LAST?

MANGLITZ: HE DIDN'T SAY WHEN, BUT I THINK IT WAS THE LAST

KLEBERG: HE HAD TOLD ABOUT THE GUY HE SAID HE WAS CRAZY, LITTLE INDIAN LOOKING MEXICAN GUY.

MANGLITZ: YEAH

KLEBERG: SOME GUY NAMED TACARLO? OR SOMETHING LIKE THAT.

MANGLITZ: YEAH. HE SAYS HE CAN'T DO THAT CAUSE HE'S GOT TO EAT IT. HE GOT

TO STOP WHERE IT IS. SO, IF THE DEA WANTS HIS CONNECTION AND HE CAN'T TURN IT IN THERE'S NO REASON TO GO.

KLEBERG: TALK ABOUT OTHER THINGS. YOU KNOW? SURE! HE'S BETWEEN A ROCK AND A HARD PLACE. I MEAN.

MANGLTIZ: UH-HUH IT'S ALRIGHT. HE'S WILLING TO SUCK IT IN.

KLEBERG: SO YOU HAD TOLD ME THAT WHEN I CALLED YOU THAT NIGHT WHEN I TOLD YOU THAT I COULDN'T MEET YOU THAT EVENING. YOU TOLD ME HE WAS WORRIED ABOUT GETTING HIS MOTHER KNOCKED OFF AND SHIT.

MANGLTIZ: YEAH, YEAH, SO, HE WILLING TO SUCK UP AND UH.

KLEBERG: WELL, I GUESS THE FARTHER YOU GO UP THE LADDER THE MORE YOU PLAY FOR KEEPS YOU KNOW.

MANGLTIZ: YEAH! HE'S A SINCERE GUY.

KLEBERG: YEAH.

MANGLTIZ: SO I COUNT ON HIM. AND I TOLD HIM TO COUNT ON YOU.

KLEBERG: WELL TELL HIM TO COUNT ON ME.

MANGLTIZ: I DID TELL HIM.

KLEBERG: I SEE MY SHIT SORT OF JELLING UP

YOU KNOW. THEY'VE BEEN TRYING TO SCARE ME HERE AND THERE AND THIS AND THAT AND I'M JUST SAYING LOOK, YOU KNOW.

MANGLTIZ: I TOLD HIM.

KLEBERG: YOU KNOW, THEY KNOW I GOT THREE POUNDS. THEY KNOW WHO I GOT IT FORM, YOU KNOW. I MEAN ALL THAT SHIT IS KNOWN. I SAID OK THATS THREE FUCKING POUNDS AND THEY CHARGED ME. . .

* * * *(G000160)

AYERSMAN: FUCK YOU AND RON? OH, MAN!

MANGLITZ:	NO, IF THE DEA SAYS "PHIL MANGLITZ'S NAME POPPED UP HERE FROM SCOTTY OR THE NEIGHBORHOOD.
AYERSMAN:	THAT WOULDN'T HAVE ANYTHING TO DO WITH THIS SHIT.
MANGLITZ:	(INAUDIBLE). . GARUFI. MAYBE GARUFI KNEW I USED TO BE IN THE DRUG BUSINESS. WHO KNOWS. (INAUDIBLE)

AYERSMAN: WELL, IF THAT'S THE CASE, YOU KNOW, I DON'T EVEN WANT TO THINK THAT WAY, BECAUSE I'M THINKING THAT HE'S FINE, YOU KNOW. WE'RE TRYING THE CASE, WE'RE MOVIN' AHEAD.

MANGLITZ: YOU'VE BEEN CHARGED? YOU'RE GOING TO GET CHARGED?

AYERSMAN: I'M SURE IT WILL HAPPEN IMMEDIATELY. YEAH. YEAH. SO, WERE BRACING OURSELVES FOR THAT, TOO. I'M JUST GONNA DO LIKE YOU SAID IN THE BEGINNING. I'M GONNA TAKE EVERYTHING ONE STEP AT A TIME AND DEAL WITH IT WHEN IT COMES UP. THAT'S ALL THERE IS TO IT. THERE'S NO OTHER WAY TO GO. (INAUDIBLE) DID YOU HAVE A GOOD WEEKEND?

MANGLITZ: YEAH.

AYERSMAN: SAME OLD SHIT?

MANGLITZ: YEAH.

AYERSMAN: FUCK.

MANGLITZ:	(INAUDIBLE). . EX-WIFE, JOCELYN. (HE TALKS ABOUT HAVING GIVEN JOCELYN SOME MONEY)
AYERSMAN:	DID YOU GET ANYTHING FOR IT, NOT THAT YOU'D WANT IT.
MANGLITZ:	I DIDN'T WANT HER BEE HIND ANYMORE.
AYERSMAN:	(LAUGHS)
MANGLITZ:	YOU KNOW, I DON'T EVEN WANT IT ANYMORE. (INAUDIBLE) . . SUNDAY, I CALLED HER UP AND SAID "CAR SOLD, BUT ID DIDN'T GET MY MONEY." SHE SAYS, I GOT A MONEY ORDER, I'LL PAY YOU MONDAY OR TUESDAY. AND I SAID WHY TUESDAY, HOW ABOUT MONDAY? I GOT A BETTER IDEA. I'LL COME OVER BACK THE KIDS UP TODAY AND I'LL BRING CASH AND I'LL CASH YOUR MONEY ORDER FOR YOU, AND YOU CAN SUBTRACT $600 FROM IT. (INAUDIBLE) WELL, I'M

	TELLING HIM YOU WERE INVOLVED IN YOUR BROTHER'S MURDER. UNLESS YOU GIVE ME $3,500.00. (THE LAST TWO SENTENCES WERE QUOTES FROM JOCELYN, PHIL'S EX-WIFE.) CAN YOU BELIEVE THAT SHIT?
AYERSMAN:	WHEN DID YOU START CRACKING UP?
(G000161)	
MANGLITZ:	(INAUDIBLE). . I'VE NEVER BEEN BLACKMAILED BEFORE. WHY SHOULD I DO IT NOW?
AYERSMAN:	WHAT A NUT!
MANGLITZ:	SO..
AYERSMAN:	SORRY TO HEAR THAT SHIT. OK, I GUESS I'LL GET GOING. I JUST THOUGHT I'D STOP. I GOTTA GO BY THE HOUSE.

MANGLITZ:	I'M NOT EVEN (INAUDIBLE)
AYERSMAN:	HE'S GONNA BLOW IT PROBABLY ON WEDNESDAY

(REFERRING TO THE PAINTER SPRAYING THE WALLS). AND I GOTTA GET THE HARDWOOD FLOOR GUY IN THERE ON THURSDAY. SO IT'S GOIN -IT'S MOVIN'. OK, BUD.

MANGLITZ: INAUDIBLE.

AYERSMAN: YEAH, WHATEVER. WE'RE STILL LOOKIN' GOOD FOR THE TIME BEING. IT WOULDN'T SURPRISE ME, THOUGH, IF THE HARDWOOD FLOOR GUY WANTS S3,500.00 AND THE PAINTER'S GONNA WANT THREE GRAND AND I GET THE APPLIANCES, THE MONEY GOES QUICK. YOU SEE, YOU KNOW, THERE'S NO SENSE RUNNING THAT TAB UP.

ANGELA: BYE, RANDY!

AYERSMAN: BYE, SWEETY!

MANGLITZ: BYE, BUDDY!

AYERSMAN: I LIKE THE FROG. IT'S GONNA BE GOOD IN SHOW AND TELL. BYE, SCOTT. OK.

MANGLITZ: (INAUDIBLE)

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES 0F AMERICA	)	
v.	)	CRIMINAL NO.
	)	0-95-0314
PHILIP MANGLITZ	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION TO EXCLUDE EXTRINSIC ACT EVIDENCE

The United States of America, through undersigned counsel, hereby opposes and responds to the motion whereby the defendant nooks an order excluding uncharged misconduct evidence. Because the evidence the defendant seeks to exclude is relevant, necessary, and reliable it should be admitted pursuant to Rule 404(b) of the Federal Rules of Evidence, and the motion should be denied.

Introduction

In his motion, the defendant quotes the notice provided by the government concerning an intent to introduce

evidence pursuant to Rule 404 (b). The notice identifies three general areas of interest: (1) the defendant's heroin, cocaine, and marijuana trafficking activities in the 1970's and early 1980's; (2) real estate transactions that the defendant conducted with drug proceeds in the late 1970's; and (3) any other uncharged misconduct revealed in tapes of conversations between the defendant and Randolph Ayersman or Dana Kleberg.

The defendant first asserts that the notice does not comply with the requirement of Rule 404 (b). Because the notice identifies the general nature of the evidence, however, it satisfies the Rule's requirements.

The defendant's complaint appears disingenuous because it is followed by argument that speaks directly to the issues raised in the notice. Moreover, during a telephone conversation on January 4, 1996, which is merely mentioned in the Motion at footnote 1, the government informed counsel for the defendant that the notice could not be more specific because the government could not locate the witness who reportedly can supply testimony about the 1970's real estate transactions. I informed defense counsel, Ms. Ornstein, at that time that we had information that the defendant, Philip Manglitz, had sold real estate to James Lee for cash drug proceeds in the late 1970's, that we could not locate Mr. Lee, but that if we did locate him and he confirmed the reports, then we would call him an a witness. Ms. Ornstein was told that the notice was provided so that she could file this motion.

Complaining about the notice under these circumstances can do no good; until the witness is interviewed at length, no more specific notice is possible.

With regard to the drug trafficking in the 1970's and 1980's, a similar response applies. The defendant makes his argument about the conviction in 1972, so the notice was apparently adequate with respect to that activity. The government also recently supplied the defendant with a copy of a transcript of his testimony for the government at the trial of United States v. Robert Coticalli, at al. in 1976. In that transcript, the defendant testified about marijuana trafficking and money laundering in which he was involved in the 1970's.

In addition, the defendant was involved in large scale marijuana trafficking in the late 1970's and early 1980's with Chris Swatta, who is also identified in the Coticalli transcript. The government submits that the 404(b) notice was adequate in this regard also, because counsel for Chris Swatta reported that Ms. Ornstein had made attempts to interview Mr. Swatta just days after the notice had been provided. The government is scheduled to interview Mr. Swatta about one week before trial and, as with Mr. Lee, cannot provide more specific notice until the interview is complete. On the other hand, because Ms. Ornstein tried to interview Mr. Swatta, it is apparent that the notice is already adequate under the Rule.

As to the third general area, the notice could not be more specific. It challenged the defendant to review the tapes

and transcripts and to identify any material he believed to be objectionable. By letter dated December 22, 1995, attached as Exhibit B to the Motion, defense counsel identified 28 pages with proposed redactions. As is demonstrated by defense counsel's letter dated December 29, the government promptly agreed to most of the requested redactions, rejecting only the ten that are annexed an Exhibit E to the Motion. Because the motion was filed in part to challenge the admission of these parts of the tape recordings, the notice has apparently worked just as contemplated by the Rule.

On these grounds, the government submits that the challenge to the adequacy of the notice should be disregarded. Because the evidence addressed by the notice in relevant, necessary, and reliable, and assuming, arguendo that the witnesses can or will be called to testify, the motion should be denied.

Argument

As the defendant correctly states in his motion, Rule 404(b) prohibits the introduction of evidence of uncharged misconduct to prove only criminal disposition. The Rule, however, does permit the introduction of uncharged misconduct to prove knowledge or intent. United States v. McLamb, 985 F.2d 1284, 1289 (4th Cir. 1993).

> Under Rule 404(b) . . . prior bad acts are admissible if they are (1) relevant to an issue

other than character; (2) necessary, and (3) reliable.

United States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988). Once the threshold requirements of Rule 404(b) are met, the court must then consider whether the probative value of the evidence is out-weighed by the potential for unfair prejudice under Rule 403. United States v. Mark 943 F.2d 444, 448 (4th Cir. 1991).

The trial court is afforded broad discretion in determining to admit evidence under Rule 404(b). United States v. Haney, 941 F.2d 602, 607 (4th Cir. 1990). Moreover, this Fourth Circuit has "endorsed an inclusionary view of the rule which admits all similar acts evidence except that which proven nothing but criminal disposition." McLamb, 985 F.2d at 1289 (citing United States v. Masters, 622 F.2d 83, 85 (4th Cir. 1980)).

1. The Requirements of Rawle Are Met

A. The various 404(b) items are all relevant to show knowledge.

In this case, the defendant is charged with participation in marijuana and money laundering conspiracies with Randolph Ayersman and Dana Kleberg. For these charges, the government must prove that the defendant know about the marijuana trafficking that he was agreeing to engage

in, and that served as the source of the money that he laundered. Both Ayersman and Kleberg will testify that they discussed with Manglitz the fact that they were in the marijuana business and that Manglitz had been "in the business" as well.

In this way, the defendant's prior involvement in drug trafficking becomes relevant and tends to show that Manglitz gained the knowledge of the marijuana trafficking that in the basis for the charges in the indictment. It in important to note that the government does not propose to offer separate proof of the defendant's convictions such as Judgment Orders; the government submits that the actual convictions are unimportant. What in relevant in the testimony that Manglitz had conversations a marijuana business. The discussions about Manglitz's past involvement tends to prove not only that the earlier discussions took place but also that Manglitz would have understood exactly the nature of the marijuana trafficking in which Ayersman and Kleberg were engaged.

As is discussed further below, there are a couple of references by Manglitz in tape recorded conversations about his past drug activities. Theme taped references tend to corroborate the testimony that similar discussions took place earlier.

Both Ayersman and Kleberg will also testify that they gave cash to Manglitz in brown paper bags and bundled in a certain manner. As is mentioned above, there may also be testimony from James Lee and Chris Swatta about their

involvement with Manglitz in marijuana trafficking in the 1970's and 1980's. If they testify, the government will seek to show that Manglitz collected cash from them that was similarly contained and bundled. Such testimony is relevant to show that Manglitz had a background that would help him to recognize the source of the cash that he was receiving from Ayersman and Kleberg; it, therefore, runs to knowledge and lack of mistake about the drug activity that generated the cash.

The gist of the money laundering offenses is that Ayersman and Kleberg were buying building lots from Manglitz with drug proceeds, that Manglitz took some or all of the purchase price of each lot in-cash, and that the settlement papers would not reveal the full purchase price. An is mentioned above, if James Lee testifies, he may state that Manglitz bought a house in Baltimore in 1980 and then transferred title to him on paper for $1. The information that is presently available is that Lee actually paid Manglitz several thousand dollars in cash drug proceeds for the house. This testimony is relevant to the extent that it shown a pattern of activity that demonstrates knowledge, and a common scheme or plan. Rawle, 845 F.2d at 1247-48. It also would tend to neutralize a defense that the purchase prices of the Ayersman and Kleberg lots were recorded incorrectly by mistake.

The main body of the 404 (b) evidence in the tape recorded conversations between Manglitz and Ayersman, and

Manglitz and Kleberg. The defendant has attached the portions of the transcripts that are in dispute. As in mentioned above, the government has already agreed to make most of the redactions that were requested by the defendant; the remaining excerpts are annexed an Exhibit E to the Motion. Each excerpt is addressed below and is identified by the Bates number stamped in the lower right corner of Motion Exhibit E.

G000005: Manglitz says "I'm not uh. totally clean you know, I've got a past, it's a past." First, this appears to refer to the conduct that is the subject of the indictment and, therefore, is not referring to any uncharged conduct. On the other hand, if it refers to past drug trafficking by Manglitz, it confirms that Kleberg known about Manglitz's past drug trafficking. When Kleberg responds, "yeah, you've got a past," Kleberg confirms that he does indeed know. This tends to support the government's theory that Manglitz know that Kleberg was engaged in marijuana trafficking when he took cash from him. The content of this short exchange not only tends to confirm that prior conversations about drug trafficking did take place, but the nature of the discussion tends to corroborate Kleberg's testimony that such conversations took place years ago. This excerpt therefore, tends to prove the knowledge element necessary for all of the charges.

G000013-14: In this excerpt, Manglitz is trying to convince Kleberg that he should "hang tough" and not

cooperate with the government. An part of this effort, Manglitz talks about an incident in 1982 or 1983 when he was under "pressure" to cooperate with authorities and he chose to serve jail time rather than cooperate, making what he calls "the right decision." This clearly demonstrates a consciousness of guilt if Manglitz wants to avoid having Kleberg cooperate against him. This consciousness of guilt tends to prove the knowledge element necessary to all of the charged offenses. United States v. Reamer, 599 F.2d 769, 770 (4th Cir. 1978).

Kleberg's cooperation with the government should only be of interest to Manglitz if there in something that Manglitz believes that Kleberg can tell the authorities. The excerpt indicates that Manglitz was concerned that Kleberg might identify him as a participant in the conspiracy. The excerpt also indicates that Manglitz was concerned that Kleberg might disclose the full scope of Ayersman's drug activities. Either way, the excerpt reveals an effort by the defendant to cover up his own involvement or Ayersman's and tends to prove that Manglitz know that the scope of Ayersman's marijuana activities far exceeded the 300 pounds seized at Ayersman's residence.

The defendant suggests that the excerpt merely shows bad character or a propensity to commit the charged offenses. The excerpt, however, does not even identify or describe an offense.

G000032: In this excerpt, Manglitz and Kleberg talk

about an incident "in the 70's" when Manglitz was "caught with fifty pounds." Because he does not say "50 pounds of marijuana," it reveals his presumption that Kleberg known what he in talking about. Kleberg confirms the presumption by referring to "the border." Both statements demonstrate that they have had similar discussions in the past and, therefore, will corroborate Kleberg's testimony to that point. The excerpt is, therefore, necessary to show Manglitz's knowledge of Kleberg and Ayersman's marijuana trafficking.

G000060: This excerpt is nearly identical to G000032 and will be offered for the same reason.

G000061: According to the letter dated December 28, 1995, annexed as Exhibit D to the motion, the government agrees to strike down to "Toothbrush, and . . ." In this excerpt, Manglitz is telling Kleberg that he will send Kleberg money if Kleberg has to serve time in prison. Manglitz offers this as a reward to Kleberg and Ayersman if they choose not to cooperate against him.

On page G000060, Manglitz says "I told Randy [Ayersman] this and I tell you this, if you guys come through stand up guys, right, and you don't roll over, I'm gonna bend over backwards to help you do whatever you wanna do, help you do whatever it takes, okay?" He goes on to say he will also help by sending Kleberg money in prison.

In the boxed excerpt on page G000061, Manglitz provides an example of how he has done this in the past with a "guy up in Hagerstown." The example tends to add weight

to the present offer and makes it clear what he means when he says "I'll send you money while you are in there you know." Without the boxed excerpt on page G000061, this sentence has no meaning. The excerpt is necessary to show the extent to which Manglitz was willing to go to keep Kleberg and Ayersman from "roll[ing] over" and cooperating against him. It tends to prove consciousness of guilt and, therefore, proves all of the elements including the knowledge that is relevant to each charge,

G000085: This very straightforward excerpt is not covered by Rule 404(b). When Manglitz says that he and Ayersman don't talk about their incriminating past, there is nothing to indicate that Manglitz is referring to anything but the conduct that is the subject of the indictment.

G000086: Here, Manglitz refers to himself as "Phil Manglitz, ex-drug dealer." As above, Manglitz tosses the phrase off in a manner that demonstrates that he and Kleberg have discussed the topic many times before. Consequently, it corroborates Kleberg's testimony to that effect and tends to prove that Manglitz had the requisite knowledge that Kleberg was in the marijuana business.

G000089: In this excerpt, Manglitz indicates that he has been talking with Ayersman about the Mexicans who were the sources of supply. This conversation illustrates that Manglitz knows as much as Kleberg about this subject and also shows the depth of their knowledge about Ayersman's marijuana business. Again, this tends to prove Manglitz's

knowledge about both Ayersman's and Kleberg's marijuana trafficking.

Manglitz does not ask Kleberg if he knew that Ayersman was getting marijuana from Mexicans; he simply says "they'll kill his mother," presuming that Kleberg will know exactly who he was talking about. And when Kleberg says "Those Mexicans out there?," the presumption is confirmed.

G000160: There are two boxed excerpts on this page. The second one and the continuation on G000161 have already been redacted in accordance with Motion Exhibit D.

As to the first box, this indicates that Manglitz and Ayersman freely discussed the fact that Manglitz had been a drug dealer. This does several things. First, as with the Kleberg excerpts, this one shows that Manglitz and Ayersman also discussed the drug business. Second, it draws a distinction between Garufi on one hand, and Ayersman and Kleberg on the other, and shows that Manglitz would not discuss the drug business with just anyone but that he did discuss the business with Ayersman and Kleberg. As with a few others above, this excerpt tends to prove Manglitz's knowledge at times pertinent to the indictment. It is therefore, relevant and necessary.

B. The 404(b) evidence is necessary

An in set forth above, the Fourth Circuit requires that

the evidence be necessary as well am relevant. Rawle, 845 F.2d at 1247. If the evidence runs to an essential element of the offense charged, it is considered "necessary." Mark, 943 F.2d at 448. Testimony that supplies useful proof of the elements of knowledge and intent also meats the requirements of being "reasonably necessary" under Fourth Circuit case law. United States v. Hadaway, 681 F.2d 214, 218 (4th Cir. 1982).

Here, all of the challenged evidence runs to the issue of whether Manglitz had knowledge of the ongoing drug business. Because knowledge is an essential element of the charged offenses, and because all of the 404(b) evidence addressed above tends to prove knowledge, it is all necessary and admissible under Rawle.

C. The 404(b) evidence is reliable

Finally, under Rawle the 404(b) evidence must be reliable. The definition of 404 reliability in a broad and flexible one. It excludes only evidence that "is so preposterous that it could not be believed by a rational and properly instructed juror." United States v. Bailey, 990 F.2d 119, 122-23 (4th Cir. 1993). Here, all of the 404 (b) evidence either in a tape recorded conversation involving the defendant, or concerns information about the defendant's prior drug involvement that is also mentioned on the tapes. With respect to the information about transfers of real property

from Manglitz to James Lee, this information will be supported with documents. Consequently, all of the evidence is reliable.

II. The Evidence Is Not Unduly Prejudicial

Once uncharged misconduct evidence is found admissible under Rule 404(b), the Court must still consider whether its probative value is substantially outweighed by its prejudicial affect. Morgan v. Foretich, 846 F.2d 941, 944 (4th Cir. 1988). Evidence found to be relevant and probative under Rule 404(b) should be excluded under Rule 403 only in those rare instances where the trial judge believes that there in a genuine risk that the emotions of the jury will be excited to irrational behavior, and that risk is disproportionate to the probative value of the evidence. Id. at 945.

The admission of extrinsic act evidence does not result in unfair prejudice under Rule 403 where it does not involve conduct any more sensational or disturbing than the crimes with which the defendant was charged. United States v. Roldan-Zapata, 916 F.2d 795, 804 (2d Cir. 1990), cert. denied, 499 U.S. 940 (1991). Here, the uncharged misconduct involves drug trafficking and money laundering by the defendant, the same types of conduct charged in the indictment.

Because the conduct is the same, it is inconceivable that the 404(b) evidence would evoke such an emotional

reaction against the defendant that the jury would be excited to irrational behavior. Mark, 943 F.2d at 449 and n.l. The uncharged misconduct evidence is, therefore, admissible under both Rules 404 and 403. The government will not object if the court chooses to give the jury a cautionary instruction concerning the permissible uses of 404 (b) evidence, both when the evidence is admitted and then again at the and of the case. See Rawle, 845 F.2d at 1248, Hadaway, 681 F.2d at 219.

There is one reference to the possibility that the Mexican sources of supply might kill Ayersman's mother in California. This is not unduly prejudicial because there is no suggestion that the defendant is in any way connected with that threat. On the other hand, the probative value of this evidence is very strong because it tends to show the level of danger and risk that Ayersman has engaged by cooperating with authorities. It is likely that defense counsel will suggest that Ayersman has concluded a favorable plea agreement and is being unjustly ???? to avoid paying the full price his crimes merited.

Conclusion

The government expects to offer evidence at trial that will reveal that Manglitz was involved in drug trafficking in the 1970's and 1980's that is not charged in the indictment. However, none of this evidence is offered to show bad

character or a propensity to commit similar offenses; it will be offered to prove that Manglitz had the knowledge required by each of the charged offenses.

Respectfully submitted,

Lynne A. Battaglia
United States Attorney

/s/ Richard C. Kay
Richard C. Kay
Assistant United States Attorney
604 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692
(410) 962-4822

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 22nd day of January, 1996, a copy of the foregoing was telefaxed and also mailed first class, postage prepaid, to Adam S. Hoffinger, Esquire, Suite 300 East, 1025 Thomas Jefferson Street, N.W., Washington, DC 20007.

/s/ Richard C. Kay
Richard C. Kay
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
	*	Criminal Case
v.	*	No. S-95-0314
	*	
PHILLIP MANGLITZ	*	

****

MEMORANDUM OPINION AND ORDER

This case is currently before the Court on Mr. Manglitz's Motion to Exclude Extrinsic Act Evidence. Mr. Manglitz moves the Court to exclude (1) evidence regarding Mr. Manglitz's twenty-three year old conviction for the importation of drugs, (2) portions of taped conversations between Mr. Manglitz and Mr. Kleberg and Mr. Manglitz and Mr. Ayersman, which purportedly refer to uncharged conduct and prior bad acts committed by Mr. Manglitz, and (3) other unidentified extrinsic act evidence that the Government apparently intends to introduce at trial regarding Mr. Manglitz's alleged drug trafficking activities in the 1970's and early 1980's and evidence regarding real-estate transactions that Mr. Manglitz allegedly conducted with drug proceeds in the 1970's. (Def's mot. at 1-3). Mr. Manglitz asserts that such evidence is classic "propensity" evidence which is

inadmissable under Federal Rules of Evidence 404(b) and 403. Mr. Manglitz further asserts that the government's notice of the extrinsic act evidence it intends to offer did not comply with the requirements of Rule 404(b). (Def's mot. at 2).

The Government, on the other hand, asserts that its notice of the extrinsic evidence it intends to offer identifies the general nature of the evidence, and therefore, satisfies Rule 404(b)'s requirements. With respect to the merits of the defendant's motion, the government argues that evidence regarding Mr. Manglitz's alleged drug trafficking and money laundering activities in the 1970's and 1980's is admissible under Federal Rule of Evidence 404 (b) to show knowledge and intent. (Govt's resp. at 4). In particular, the government contends that evidence of Mr. Manglitz's prior drug trafficking is relevant in that it tends to show that Manglitz gained the knowledge of marijuana that is the basis for the charges in the indictment." (Govt's rep. at 5). As to evidence of prior money laundering, the government asserts that such evidence in relevant to the extent "that it shows a pattern of activity that demonstrates knowledge and a common scheme or plan." (Govt's rep. at 5).

I. The Adequacy of the Government's 404(b) Notice

Rule 404(b) provides that "upon request by the accused,, the prosecution in a criminal case shall provide

reasonable notice in advance of trial. . . of the general nature of any evidence it intends to introduce at trial." The Advisory Committee notes accompanying the 1991 Amendment state that the Committee "rejected a proposal that the notice satisfy the particularity requirements normally required of language used in a charging document. . . .Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts." Advisory Committee Notes.

In a letter dated December 1, 1995, Assistant United States Attorney Richard Kay provided Debra Ornstein with the following 404(b) notice:

> As to 404(b) evidence, at this time, the government intends to introduce evidence of your client's heroin, cocaine, and marijuana trafficking activities in the 1970's and early 1980's, and evidence that Manglitz conducted real estate transactions with drug proceeds in the late 1970's. Also, because the government intends to introduce the tapes and transcripts that have been provided to you, you should assume that any uncharged misconduct that is revealed in the tapes will be introduced as well.

Mr. Kay asserts that further notice regarding the alleged real-estate transactions in the 1970's was provided to Ms. Ornstein, one of Mr. Manglitz's lawyers, during a telephone

conversation on January 4, 1996, in which he informed No. Ornstein that the government had information that Mr. Manglitz sold real-estate to James Lee in the 1970's, and that, if they could locate Mr. Lee they would call him as a witness. According to Mr. Kay, he informed Ms. Ornstein that "notice could not be more specific because the government could not locate James Lee."

With respect to notice regarding Mr. Manglitz's drug trafficking activities in the 1970's and 1980's, Mr. Kay indicates that the government provided the defense with a copy of Mr. Manglitz's 'testimony at a 1976 trial concerning his drug trafficking and money laundering activities in the 1970's. Mr. Kay further asserts that Mr. Manglitz was involved in drug trafficking in the late 1970's and early 1980's with Chris Swatta, a man identified in the 1976 trial transcript. The government, which intends to interview Mr. Swatta this week, states that notice with respect to Mr. Swatta was adequate. To support this contention, Mr. Kay points to the fact that Ms. Ornstein tried to interview Mr. Swatta just days after notice was given. Finally, Mr. Kay argues that, in providing the defense with copies of the government's tapes and transcripts, he gave the defense notice of the uncharged conduct and prior bad acts that are revealed in the tapes.

In this case, the government's notice was adequate with respect to Mr. Manglitz's 1972 conviction and the uncharged conduct and prior bad acts revealed in the tapes. By informing Ms. Ornstein of Mr. Lee, the government also

gave adequate notice with respect to evidence regarding Mr. Manglitz's alleged money laundering activities in the 1970's.

The government's notice with respect to the evidence it intends to introduce regarding Mr. Manglitz's drug trafficking activities in the 1970's and 1980's, however, was inadequate. While the government need not provide precise details regarding the date, time and place of prior acts, the government must provide sufficient notice to apprise the defendant of the general nature of the extrinsic acts the government intends to introduce. United States v. Jackson, 850 P. Supp. 1481 (D. Kan. 1994); United States v. Long, 814 F. Supp. 72 (D. ran. 1993) , United States v. Williams, 792 F. Supp. 1120 (S.D. Ind. 1992). Merely providing the defense with a transcript of the defendant's testimony in a 1976 case which mentions Chris Swatta does not provide sufficient notice to apprise the defendant of the extrinsic acts the government intends to rely on with respect to Mr. Manglitz's alleged drug trafficking activity in the 1970's and 1980's.

Although the government's initial notice on the drug trafficking evidence did not comply with Rule 404(b), the government's January 19 , 1996, reply motion did provide the defense with sufficient information in advance of trial regarding such evidence. Therefore, suppression of such evidence is not required See Long, 814 F. Supp. at 74.

II. The Admissibility of 404(b) Evidence

It appears from the Government's response to the defendant's motion that there are numerous types of extrinsic evidence that the government may attempt to introduce at trial. At this time, the Court need only rule on the admissibility of other crimes, wrongs, or acts evidence contained in tape recorded conversations between, Mr. Manglitz and Mr. Ayersman and Mr. Manglitz and Mr. Kelberg. The Court will rule on the admissibility of other extrinsic act evidence if and when such rulings become necessary.[1]

---

[1]The government contends that it may call Mr. James Lee as a witness to testify about real estate transactions that Mr. Manglitz allegedly conducted with cash drug proceeds in the 1970's, and that it may call James Swatta to testify about Mr. Manglitz's alleged drug trafficking activities in the 1970's and 1980's. An of January 19, 1996, the government had not yet located Mr. Lee and had not yet interviewed Mr. Swatta. The Court, therefore, is deferring its ruling on the admissibility of the Rule 404(b) aspects of Mr. Lee's and Mr. Swatta's testimony. The Court is also deferring its ruling on the admissibility of testimony by Ayersman and Kleberg to the effect that "they were in the marijuana business and that Manglitz had been in this business an well." (Govt's resp. at 5). With respect to evidence concerning Mr. MANGLITZ's 1972 conviction for drug importation, the government claims that it "does not propose to offer separate proof of the defendant's conviction such as Judgment orders, but rather, is interested in testimony that Mr. Manglitz had conversations about the drug business." (Govt's opp. at 5). Because the government does not intend to introduce evidence of the conviction itself, the defendant's motion to suppress such evidence is moot.

The Court notes, however, that extrinsic evidence regarding Mr. Manglitz's alleged drug trafficking activities in the 1970's and early 1980's and evidence regarding real-estate transactions that Mr. Manglitz allegedly conducted with drug proceeds in the 1970's is " 'tenuous and remote in time from the charges in the indictment.' " United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). The Court, therefore, will not entertain any specific evidence regarding Mr. Manglitz's activities in the 1970's and early 1980's. This case will not be sidetracked by trying events that occurred twenty years ago. See Federal Rule of Evidence 403. With respect to general evidence of Mr. Manglitz"s alleged past drug trafficking and money laundering, the Court will carefully examine the use for which such evidence is offered. Hernandez, 975 F.2d at 1040. The government its admonished to present its case with these principles in mind.

Rule 404 (b) provides that "[e]vidence of other crimes, wrongs, or acts in not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of intent, . . . plan, [or] knowledge . . ." In United States v. Rowle, 843 F.2d 1244, 1247 (4th Cir. 1998), the Court hold that "prior bad acts are admissible if they are (1) relevant to an issue other than character (2) necessary, and (3) reliable." If evidence of prior bad acts is admissible under 404(b), then a court, pursuant to Fed. R. Evid. 403, must determine whether the probative value of the evidence in

substantially outweighed by the prejudicial effect of such evidence. The trial court is afforded broad discretion in determining whether to admit 404(b) evidence. United v. Haney, 914 F.2d 602, 607 (4th Cir. 1990).

In this case, the defense has objected to the prospective admission of ten excerpts contained in tape recorded conversations between Mr. Manglitz and Mr. Kleberg and Mr. Manglitz and Mr. Ayersman on the grounds that the excerpts contain inadmissible extrinsic act evidence. The Court will separately address the admissibility of each excerpt.

A. G000005

> Manglitz: Hey I'm not totally clean you know, I've got a past, its a past.
>
> Kleberg: Yeah, you have a past:

This excerpt is inadmissable under Rule 404(b), as it has insufficient probative value to satisfy Rawle. This excerpt clearly refers to past conduct. The passage, however, is vague as to the nature of Mr. Manglitz's past.[2] The excerpt, therefore, does not provide proof of Mr. Manglitz's knowledge of drug trafficking or money laundering. Rather, it appears to be the type of character evidence forbidden by 404(b).

a. G000013-G000014

---

[2]The government argues that Mr. Manglitz is referring to past drug trafficking. (Govt's rep. at 7). Such an interpretation is not, however, self-evident.

In this passage, Mr. Manglitz is discussing with Kleberg his decision in 1982-1983 to go to jail rather than to cave into pressure from the authorities to cooperate.

The portion of the excerpt beginning on page G000013 with Kleberg stating "Hum, huh," and ending at the bottom of page G000013 with Kleberg again stating "Huh, huh" is inadmissable because it has no probative value. The fact that Mr. Manglitz was sentenced to three years and served eight months and two weeks is not relevant to the issue of Mr. Manglitz's knowledge with respect to any of the charges. The rest of the passage, however, is admissible.

On page G000013, Manglitz, discussing the reasons why his decision not to cooperate with the police was "the right" decision, states, "And if I didn't talk, I didn't, I, I could keep my money, hide it, but when, if I had talked, they wanted to know everything about everybody, my whole life and how much I made." This excerpt is relevant to the issue of knowledge. In pleading not guilty to 18 U.S.C. 1956(h) and 18 U.S.C. 1957, two crimes which require knowledge, Mr. Manglitz placed his mental state in issue, and therefore, the Government can offer evidence of prior bad acts to address the issue of knowledge and common scheme or plan. United States v. Mark, 943 F.2d 444, 448 (4th Cir. 1991). While Mr. Manglitz's plea of not guilty does not "permit any sort of uncharged act to be brought to bear," Hernandez, 975 F.2d at 1039, evidence regarding the fact that Mr. Manglitz knew how to hide money in 1992-1993 is "sufficiently related

to the charged offenses of [money laundering and conspiracy to money launder]." See Rawle, 845 F.2d at 1247 n. 3.; Mark, 943 F.2d at 449. Moreover, since knowledge in an element of both money laundering offenses, such evidence in necessary, in the Rawles sense. See Rawle, 845 F.2d at 1247 n. 4. See also United States v. McLamb, 985 F.2d 1284 (4th Cir. 1993) ("If the defendant in fact committed or ratified the similar acts, there can be little doubt that they are relevant and necessary to the government's effort to demonstrate that McLamb had the necessary specific intent for . . . money laundering. . . ."). The evidence is also reliable, in that it is a taped conversation between Manglitz and Kleberg.

Finally, the Court finds that evidence regarding the fact that Mr. Manglitz could hide his money if he did not cooperate with authorities is substantially outweighed by the danger of "unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. Such evidence, as mentioned above, has substantial probative value. Moreover, evidence of the fact that Manglitz wanted to hide his money is not likely to excite the jury to irrational behavior.[3] Any slight danger of unfair prejudice, confusion of the issues, or

---

[3]The general comment that "if I didn't talk I could keep my money, [and] hide it," is not nearly as inflammatory and prejudicial as Mr. Manglitz's comments that he was caught with 50 pounds, see G000032 and G000062, that he was known to the FBI as a drug dealer, see G000086, and that he used to be in the drug business, G000160.

misleading the jury may be cured by a cautionary instruction, on the defendant's request.

Consequently the excerpt on G000013 and G000014 in admissible.

C. G000032 and G000060

In these two passages, Mr. Manglitz is discussing with Kleberg the fact that in the 1970's he was caught with fifty pounds of marijuana down at the border, near Laredo, Texas. These two passages are inadmissable under Federal Rule of Evidence 403, because the probative value of such evidence is substantially outweighed by the danger of unfair prejudice.

In this case, the probative value of such specific evidence regarding Mr. Manglitz's arrest for 50 pounds of marijuana and his subsequent sentence for the crime is slight. Although the evidence demonstrates that Mr. Manglitz has knowledge of marijuana trafficking, the evidence is " 'tenuous and remote in time from the charges in the indictment.' " United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). The risk that the jury will be excited to irrational behavior by such specific evidence of Mr. Manglitz's past drug trafficking activities is disproportionate to the probative value of such evidence. Consequently, the marked passages at G000032 and G000060 are inadmissible under Rule 403.

D. G000061

The government has agreed to strike everything in this passage from "When I was in, I served Um . . . to Toothbrush and." Although there is still evidence in this passage

indicating that Mr. Manglitz served time in jail, the specific evidence regarding his sentence has been stricken.

This excerpt in admissible. As the government notes, on page G000060-G000061, Mr. Manglitz says to Mr. Kleberg, "I told Randy this and I tell you this, if you guys come through stand up guys, right, and you don't roll over, I'm gonna bend over backwards to help you do whatever you wanna do, help you do whatever it takes. . . I'll send you money while your [sic] in there you know." Then, in the boxed excerpt on page G000061, Mr. Manglitz tells Mr. Kleberg that he sent $1,000 to a "guy" in Hagerstown.

The government argues that "the excerpt in necessary to show the extent to which Mr. Manglitz was willing to keep Kleberg and Ayersman from "roll[ing] over and cooperating against him it tends to prove consciousness of quilt and, therefore, proves all of the elements including knowledge that is relevant to each charge." (Govt's rep. at 10). The Court agrees.

In this situation, the evidence concerning Mr. Manglitz's time in jail does not itself prove knowledge, but is contained in an excerpt that does, and, therefore, it is admissible as part of the excerpt. The passage itself is clearly relevant to the issue of Mr. Manglitz's knowledge of the activities of Mr. Kleberg and Mr. Ayersman. The passage is necessary, in the Rawle sense, to prove the knowledge element of the charged crimes. See Rawle, 845 F.2d at 1247 n. 4. Moreover, Manglitz's statements in the excerpt will help

explain to the jury the alleged relationship between Manglitz and Kleberg, and, therefore, the excerpt is necessary to complete the story of the crimes charged. Powers, 59 F.3d at 1466; See also United States v. Brennan, 798 F.2d 581, 591 (2nd Cir. 1990). The evidence is also reliable, in that it is contained in a tape, recorded statement of the defendant.

Finally, the probative value of the passage and the evidence of Mr. Manglitz's time in jail contained therein is not

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. As previously noted, the prior bad act evidence is not itself being offered to show knowledge, but rather, is contained in a passage that is being offered for such a purpose. Moreover, the evidence regarding Mr. Manglitz's time in jail is so vague as not to prejudice him unduly. There is no evidence suggesting why Mr. Manglitz was in jail or how long he served. The risk that the jury will be excited to irrational behavior by the prior bad act evidence contained in the excerpt on page G000061 is not disproportionate to the probative value of such evidence. See United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). Further, any danger of unfair prejudice can be cured by a limiting instruction, on the defendant's request. Consequently, the marked passage on G000061 is admissible.

E. G000085

In this passage, Mr. Manglitz says "we [Manglitz and

Ayersman] don't talk about ah, you know, you know our past, because that a . . . tricky past. So he's not out trying to trying to get me to talk about ah incriminating or anything like that." This excerpt is not covered by 404(b). In the indictment Mr. Manglitz is charged with conspiring with Ayersman and Kleberg from approximately 1987-1995 to launder money and to distribute and possess with intent to distribute marijuana. Unlike Mr. Manglitz's vague reference to his past in the excerpt on page G000005, when Manglitz, in this excerpt, says that he and Ayersman have a tricky past, he appears to be referring to conduct covered in the indictment. Evidence of Manglitz's and Ayersman's "past" together is not other crimes" evidence and, therefore, is admissible without reference to Rule 404(b) as direct evidence on the conspiracy charge. See United States v. Kennedy, 32 F.2d 876, 885 (4th Cir. 1994). F. G000086

In this excerpt, Mr. Manglitz says, "you know, whether they're tapping your line, and then they see Phil Manglitz ex-drug dealer and they tap my line." This excerpt is inadmissible.

In United States v. Brewer, 1 F.3d 1430, 1432 (4th Cir. 1993), the defendant, who was convicted of eight counts of possession with the intent to distribute cocaine, claimed that the district court erred in admitting the testimony of his fiancee, who was called to testify that she told United States Marshals that the defendant was a drug dealer. In Brewer, the Court did not address the issue of whether the admission of

such testimony was error. The Court did, however, state that "we have some doubt whether evidence of an occupation or status like,'drug dealer', falls within the realm of 'other crimes, wrongs, or acts, admissible to show knowledge. . . under Rule 404(b) . . . . On the surface, it more closely resembles forbidden character evidence." Id. at 1435.

In this case, the reference to Phillip Manglitz, ex-drug dealer, is not-admissible to show knowledge, but rather, is improper character evidence which is being introduced to show conduct in conformity with character. Moreover, any slight probative value that this evidence may have clearly is substantially outweighed by the danger of undue prejudice. Consequently, this excerpt is inadmissible under Brewer.

G. G000089

In this passage, Mr. Manglitz and Mr. Kleberg are discussing the fact that Mr. Ayersman can not "cut a deal" with the police because some Mexicans will "kill his mother" if he does. This excerpt is relevant to Mr. Manglitz's knowledge of Randy Ayersman's activities. Moreover, there is no bad act evidence as to Mr. Manglitz contained in the excerpt.

H. GOOO160

In this excerpt, Mr. Manglitz says, "Maybe Garufi knew I used to be in the drug business." This passage is inadmissable under Rule 403. Although such a statement is relevant to the issue of Mr. Manglitz's intent and knowledge with respect to the drug charges in this case, as with G000032

and G000060, the probative value of such evidence is slight. Indeed, Mr. Manglitz says, he used to be in the drug business, which suggests that he is currently out of the drug business. The risk that the jury will be excited to irrational behavior and want to punish Mr. Manglitz for his admitted past drug dealing is disproportionate to the minimal probative value of such evidence. United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). Consequently, this excerpt is inadmissible under Rule 403.

I. G000160-G000161

This passage, which begins at the bottom of page 0000160 and continue's on the top of page G000161, has already been redacted. The motion with respect to this excerpt, therefore, is moot.

III. CONCLUSION

For the reasons stated, the excerpt on G000005 is inadmissible, the redacted portion of the excerpt on G000013-G000014 is admissible, the excerpts on G000032 and G000060 are inadmissible, the redacted portion of the excerpt on G000061 is admissible, the excerpt on G000085 is admissible, the excerpt on G000086 is inadmissible, the excerpt on G000089 is admissible, the excerpt on G000160 is inadmissible. The excerpt on G000160-G000161 has already been redacted, therefore, the motion to exclude this excerpt is moot.

It is so ordered, this */s/* 25th day of January, 1996.

/s/Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.
v.	)	S-95-0314
	)	(Maletz)
PHILIP MANGLITZ,	)	
Defendant.	)	
	)	

DEFENDANT'S OMNIBUS MOTION IN LIMINE
TO EXCLUDE EVIDENCE AT TRIAL

Philip Manglitz respectfully submits this motion to exclude certain evidence that the Government may seek to offer at trial. Specifically, the motion seeks to preclude the following Government witnesses from testifying:

James Lee (Section I),
Chris Swatta (Section I),
Kevin Antoniacci (Section II),
Charles Maier (Section II),
Jack Cooper (Section VI), and
Duncan Forest (Section VII);

as well as testimony concerning:

past criminal activity of Mr. Manglitz (Section III),
the quantity of marijuana involved in the conspiracy charged in Count One (Section IV), and
whether Mr. Manglitz is "dangerous" or to be feared (Section V).

The motion also seeks to exclude in their entirety tape recorded conversations between Mr. Manglitz and Dana Kleberg and Randolph Ayersman, respectively (Section VIII), and, in particular, a portion of a conversation on Tape N-87 that refers to Mr. Manglitz past involvement "in a conspiracy" (Section IX).

FACTUAL BACKGROUND

This is a money laundering case against one of two general partners in Carman Associates, a real estate development business. Two of Carman Associates' customers were Randolph Ayersman and Dana Kleberg. Randolph Ayersman built homes on the lots he purchased from Carman Associates; Dana Kleberg assisted him. In December 1994, Ayersman was arrested for running a large scale marijuana distribution network. Dana Kleberg also was arrested in December, 1994 for distributing large amounts of marijuana. After their arrests, both began cooperating with the Government.

Mr. Manglitz' partner in Carman Associates, Ronald Carter, pled guilty to tax evasion and also is cooperating with the Government. In July 1995, Mr. Manglitz was indicted on

six substantive counts of money laundering (18 U.S.C. § 1957), a money laundering conspiracy charge (18 U.S.C. S 1956(h)), and for participating in Ayersman's and Kleberg's drug conspiracy (21 U.S.C. 9 846), as well as with aiding and abetting the possession of marijuana (21 U.S.C. 5 841). The indictment also contains a criminal forfeiture. At the time of indictment, the prosecution also instituted a civil forfeiture action against Mr. Manglitz arising out of some of the same conduct and properties at issue in the indictment. All of the persons named in the indictment, other than Manglitz, are cooperating witnesses.

The essence of the allegation against Mr. Manglitz is that he, along with Mr. Carter, accepted cash from Randy Ayersman and Dana Kleberg as partial payment for the sale of Carman Associates' properties, thereby laundering Ayersman's and Kleberg's drug money. There will be no evidence at trial that Mr. Manglitz sold or purchased marijuana. Moreover, the tapes the Government is seeking to admit into evidence -- secretly recorded conversations between Mr. Manglitz and Randy Ayersman and Dana Kleberg, -- contain no evidence of money laundering, or of any other crime with which Mr. Manglitz is charged. In fact, on tape, Mr. Kleberg tries to get Mr. Manglitz to accept $100,000 in cash but Mr. Manglitz refuses.

Perhaps because of the paucity of evidence of charged conduct, the Government is expected to call as witnesses in this case people who will testify about Mr. Manglitz' past

(Chris Swatta and James Lee) and those who will testify to the extent of Ayersman's drug dealing empire (Kevin Antoniacci and Charles Maier). In addition, Ayersman and Kleberg are expected to provide testimony in the nature of 404 (b) evidence.[4] This motion seeks to exclude such witnesses and evidence from trial and to alert the Court of serious legal issues surrounding potential testimony by Government witnesses Jack Cooper (attorney-client privilege) and Duncan Forest (fruits of the unlawful search of Mr. Manglitz' residence) It also seeks to exclude the tapes because they are not probative of the issues of this case.

I. THE TESTIMONY OF JAMES LEE AND CHRIS SWATTA SHOULD BE EXCLUDED UNDER RULES 404 (b) AND 403

Judge Smalkin's decision granting in part and denying in part Mr. Manglitz motion to Exclude Extrinsic Act Evidence deferred ruling on whether to permit James Lee and Chris Swatta to testify because it was not clear that the Government expected to call them as witnesses. January 25, 1996 Memorandum opinion and order, at 5, n. 1. ("Opinion") (A copy of Judge Smalkin's decision is attached hereto at Tab

---

[4]In a memorandum opinion and order dated January 25, 1996, Judge Smalkin already has excluded certain evidence under Rule 404(b) of the Federal Rules of Evidence.

1).[5] The Government has provided Mr. Manglitz with Giglio material for these individuals, indicating that the Government intends to call them as witnesses at trial to testify about narcotics trafficking activities that occurred fifteen to twenty years ago.

Based on the parameters established by Judge Smalkin for the admissibility of 404(b) evidence, both James Lee and Chris Swatta should be precluded from testifying at trial. Judge Smalkin's Opinion states as follows:

> At this time, the Court need only rule on the admissibility of other crimes, wrongs, or acts evidence contained in tape recorded conversations between Mr. Manglitz and Mr. Ayersman and Mr. Manglitz and Mr. Kleberg. The Court will rule on the admissibility of other extrinsic act evidence if and when such rulings become necessary. (footnote 1 omitted)
>
> The Court notes, however, that extrinsic evidence regarding Mr. Manglitz's alleged drug trafficking activities in the 1970's

---

[5]In the Government's opposition, the Government indicated that James Lee and Chris Swatta might testify, but that Mr. Lee could not be located and Mr. Swatta had not yet been interviewed. Government's Response to Defendant's Motion to Exclude Extrinsic Act Evidence ("404(b) Opposition").

> and early 1980's and evidence regarding real-estate transactions that Mr. Manglitz allegedly conducted with drug proceeds in the 1970's is " 'tenuous and remote in time from the charges in the indictment.' " United States v. Hernandez, 975 F.2d 1035, 1039-1040 (4th Cir. 1992). The Court, therefore, will not entertain any specific evidence regarding Mr. Manglitz's activities in the 1970's and early 1980's. This case will not be sidetracked by trying events that occurred twenty years ago. See Federal Rule of Evidence 403. With respect to general evidence of Mr. Manglitz's alleged past drug trafficking and money laundering, the Court will carefully examine the use for which such evidence is offered. Hernandez, 975 F.2d at 1040. The government is admonished to present its case with these principles in mind.

Opinion, at 5-6 (emphasis in original).

The testimony of James Lee and Chris Swatta is precisely the type of specific evidence that Judge Smalkin excluded. Moreover, the admission of that testimony would violate Judge Smalkin's admonition that the case not be "sidetracked by trying events that occurred twenty years ago". The Government's 404(b) Opposition stated that Lee and Swatta would testify about "their involvement with Manglitz

in marijuana trafficking in the 1970's and 1980's." 404 (b) Opposition at 6; see id. at 1 ("early 1980's"). Lee supposedly also would testify that "Mr. Manglitz sold [him) real estate for cash drug proceeds in the late 1970's". Id. at 2, 6. Both witnesses would be testifying about events that occurred fifteen to twenty years ago, when Mr. Manglitz was a young man (he is now forty-eight) and long before he married and started a family (he now has sole custody of his two children, ages six and eight). By the Government's own concession, neither of these witnesses would testify about the events alleged in the indictment, events which are alleged to have occurred during the 1990's.

In addition to being "tenuous and remote evidence of Mr. Manglitz' prior involvement in "marijuana trafficking", is unduly prejudicial. The potential for the jury to equate Mr. Manglitz past involvement in marijuana trafficking with a propensity to commit the conduct for which he is charged is particularly great here where Mr. Manglitz is charged with laundering marijuana proceeds and with participating in a conspiracy to distribute marijuana.

The Court should preclude the testimony of both James Lee and Chris Swatta.

II. THE TESTIMONY OF KEVIN ANTONIACCI AND CHARLES MAIER SHOULD BE EXCLUDED UNDER RULE 403

According to the plea agreement of Kevin Antoniacci, Antoniacci purchased marijuana from Kleberg for further distribution in Howard County and elsewhere. Charles Maier, according to his plea agreement, sold marijuana to Ayersman in California. The Government has informed us that neither one of these witnesses knows Mr. Manglitz. Moreover, there is no evidence that Mr. Manglitz was involved in the purchase or sale of marijuana. . . . . .

(Excerpts from Trial Proceedings before Honorable Herbert N. Maletz on June 3-25, 1996)

Page 6-7

THE COURT: The court will rule as follows: The the government has proffered that Lee and Swatta would testify about involvement with Manglitz in marijuana trafficking in the early 1980's. The court holds following upon Judge Smalkin's earlier ruling that this testimony, specifically, would cause undue delay, and is simply cumulative to allow the case to be sidetracked by trying events that occurred 20 years ago. To that extent, the testimony of Lee and Swatta will be excluded.

The government has also proffered that James Lee would testify that Manglitz sold him real estate for drug proceeds in the late 1970's. In the courts view, this testimony goes to one of the key elements of the money laundering count against Manglitz and, therefore, goes to alleged knowledge that the money came from unlawful sources and that testimony will not be excluded.

Next point.

Testimony of --

MR. HOFFINGER: Charles Maier.

THE COURT: I think, very simply, your request is, in effect, a James hearing. You are familiar with a James hearing?

MR. HOFFINGER: Absolutely, Your Honor.

THE COURT: What the court will do on that point, I don't know that further argument is going to enlighten the court. I am very familiar with the whole issue.

MR. HOFFINGER: Our request for a James hearing, is really in the alternative. Your Honor is correct.

THE COURT: The court, I will say this and I think this is in lieu of a James hearing. You can be seated, Mr. Hoffinger.

This issue has come up in case after case. It if almost endemic. The government with respect to Vivian, Antoniacci, and Charles Maier, the government contends that these witnesses were members of the Manglitz marijuana conspiracy that dealt with Andy Ayersman or Dana Kleberg. The defendant seeks to preclude the testimony, or in the alternative request that the court hold a James hearing. This is a matter that comes up over and over again. The court will not allow this testimony to be received as co-conspirator's testimony, unless the government establishes a foundation that there is a conspiracy. In the event the conspiracy is established by the government, pursuant to Bourjaily. I think the counsel are familiar with Bourjaily, among others.

MR. HOFFINGER: Yes, Your Honor.

THE COURT: If that foundation is established, then the court will consider whether the testimony is properly admitted under Rule 801 (d) (2) (E). That is the Court's ruling on that.

Q Did Sharon Dixon tell others about your marijuana business?

A No.

Q In fact, are you aware that she told her friend, Sue Nieman after your arrest that she had not known that you were selling marijuana?

A I don't know what she told Sue Neiman.

Q It wouldn't surprise you that she lied to the neighbors about knowing about your marijuana business, who it, sir?

A No, it wouldn't.

Q Did Sharon Dixon help you run your marijuana business?

A No.

Q Did she make or accept deliveries?

A Never.

Q Did she deposit proceeds of your marijuana business?

A Yes.

Q What did she do?

A She would pay bills with money orders.

Q And she knew that those money orders had represented proceeds of the marijuana business?

A I gave her the cash. I didn't explain it exactly.

Q She also, well, you gave her the cash?

A Yes.

Q And was it rolled up and bundled in paper bags?

Q Roller?
A Yes.
Q A car lift that lifts cars up?
A Yes.
Q You get to keep that stuff, right?
A Yes.
Q That was yours, right?
A Yes.

THE COURT: Excuse me. At this point we are going to take our afternoon recess, ladies and gentlemen, and we will resume in 15 minutes.

(The following proceedings were had in open court out of the presence and hearing of the jury:)

THE COURT: I am going to see counsel at the Bench, please.

(The following proceedings were had at the Bench out of the hearing of the jury:)

THE COURT: The court has reviewed the memoranda of interview prepared after the interviews of Ronald Carter on August 15th, 1995, and February 28th 1995. First, the court concludes that the August 15th, 1995, memorandum is not a statement within the meaning of 18 U.S.C. section 3500, the Jencks Act and, therefore, need not be provided to the defendant.

The court does not reach the issue of whether the

February 28th memorandum are statements and, thus, within the purview of the Jencks Act. Nevertheless, the court concludes that the February 28th report must be provided to the defendant as Brady evidence.

THE COURT: We will now take our recess.

(A brief recess was taken.)

(After recess.)

(The following proceedings were had in open court out of the presence and hearing of the jury:)

RANDOLPH AYERSMAN, resumed the stand.

(The following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Please be seated, if you will.

Mr. Hoffinger.

MR. HOFFINGER: Thank you, Your Honor.

FURTHER CROSS EXAMINATION

BY MR. HOFFINGER:

Q Mr. Ayersman, did you purchase cashiers checks with cash and give them to Mr. Manglitz?

A Possibly.

Q You never told Agent Forletta, or any other agents, that you would use cashiers checks, did you, sir?

A They knew I used cashiers checks.

Q That is not my question, you never told them that you used cashiers checks did you, sir?

*** Page 454-455 ***

THE COURT: I will say this, there was a significant delay in turning over what the court regards as Brady term. Considering that, of course, I must necessarily have to change the ruling on no further recross except on the Brady material. That will apply to Mr. Ayersman. He may, depending on defense counsel's wishes, be subject to further cross examination tomorrow. Subject, of course, to redirect and, shall we say, re redirect and re recross. Yes.

Mr. AHLERS: Thank you, Your Honor. The reason we asked to approach the Bench --

THE COURT: Secondly, the next matter is whether you desire to continue your cross-examination of Maier this afternoon.

MR. AHLERS: I do, Your Honor. I would simply ask if somehow this court instruct the jury as to why it is there was this.

THE COURT: I certainly am not going to put the government in a position prejudice of indicating the reason he is being called for further cross-examination is the government has delayed turning over various reports. In the first place, as far as Jencks is concerned whether certain reports should or should not be turned over is an argument at best. Mr. Kay, in my judgment, in good faith, concluded the material supplied to you by the court is not Jencks material. I am sure that was done in good faith. This court has taken a very of Jencks. Given the fact that there is no absence of good faith, I think it would be prejudicial to the government

to indicate that the government has caused a delay in turning over the reports. I will indicate, however, that certain matters have come up to the jury, the result of which the court has permitted further cross-examination of Mr. Maier. Is that satisfactory to both sides?

MR. KAY: Fine, Your Honor.

MR . AHLERS: Satisfactory, Your Honor. Thank you.

(The following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Well, ladies and gentlemen, I do want to say that yesterday you heard the testimony of Mr. Maier on direct, cross, redirect, and recross, since that time certain matters have come up for which neither party is at fault, that necessitates his further cross-examination Ahlers. And Mr. Maier is waiting?

MR. KAY: Yes, Your Honor.

CHARLES MAIER, resumed the stand.

*** Page 480 ***

Q Is there a particular reason they didn't pay you in amounts less than 20's?

A Because it was very bulky and I requested at least 20 dollar bills.

Q You requested that?

A Yes.

Q Of all three of them?

A Yes.

Q And was the money organized in any particular way, did you request a particular organization?

A Yes, I requested them to bundle it usually in thousand dollar increments, and if it was like $10,000.00 they would bundle it again.

Q When you say bundled, was it restrained in any way?

A Yeah, rubber bands.

Q And what about the cash itself, was it contained in anything?

A Yeah, I had it in a brown paper bag like a grocery bag.

Q You said you had it, was it delivered to you that way?

A Yes, most of the time.

Q Would that apply to Antoniacci, Vivian, and Schweitzer?

A Yes.

Q Did you request that they pay you in that means?

*** Page 570-573 ***

MR. AHLERS: Your Honor --

THE COURT: I am just talking about the rule. He is complying with the rule.

MR. HOFFINGER: Your Honor, I think Mr. Ahlers.

THE COURT: I am asking Mr. Ahlers.

(There was a pause in the proceedings.)

THE COURT: The rule manifestly only references to written statements. And your argument is that as a matter of comity between the parties, a matter of full disclosure, the statement should have been revealed.

MR. AHLERS: Yes, Your Honor.

THE COURT: What do you say about that?

MR. KAY: It was revealed in the government's response to the motion with regard to 404 (b) evidence. There was a discussion in there. And it is mentioned in Judge Smalkin's memorandum and order.

MR. HOFFINGER: Only in a very general way, Your Honor.

THE COURT: I will overrule the objection. You may proceed.

(The following proceedings were had in open court, in the presence and hearing of the jury:)

BY MR. KAY:

Q Mr. were telling us about a conversation that you had with Philip Manglitz on the flight back from Acapulco, again, when was that?

A That was in 1994.

Q And what did you tell him --

THE COURT: Where was this?

THE WITNESS: This was on an American Airlines flight from Acapulco, Mexico, to Dallas-Ft. Worth International Airport.

Q And what did you tell Mr. Manglitz?

A Well, we got just a rambling discussion about the marijuana trade.

Q And was he participating in the conversation?

A Yes, he was.

Q Did he say thing about the marijuana business?

A. Yes.

Q What did he say about it?

A That lie had been in the business at one time.

Q What else did he tell you about the marijuana business?

A Well, he had been arrested down on the Texas-Mexican

THE COURT: Just a moment. There is an objection?

MR. AHLERS: Objection.

THE COURT: I am going to sustain the objection. And You are very close --

MR. KAY: Your Honor, I won't go any further.

THE COURT: -- to trespassing on the court's order.

MR. HOFFINGER: We would like to make a motion, Your Honor. May we approach, Your Honor.

THE COURT: Yes, you may.

(The following proceedings were had at the Bench out the hearing of the jury:)

THE COURT: I will say, I will preclude further inquiry in this particular area with respect to this particular discussion.

MR. KAY: Yes, Your Honor.

THE COURT: I have directed you not to lead the witness and you indicated was there something else said. Now you make your motion.

MR. AHLERS: I would like to move for a mistrial and perfect our record on the mistrial briefly.

THE COURT: Your motion for mistrial will be denied. Proceed.

MR. AHLERS: Could we admonish the prosecutor because it was contravention.

THE COURT: The prosecutor will now be admonish if you engage in this kind of activity I will preclude any further testimony with respect to this witness.

I don't think we need anything further.

MR. AHLERS: The answer, I move to strike the testimony, Your Honor.

THE COURT: That motion will be denied. You may proceed.

(The following proceeding were had in open court in the presence and hearing of the jury:)

THE COURT: That last question of counsel will be stricken as improper. Now, proceed.

MR. KAY: Thank you, Your Honor.

MR. AHLERS: Your Honor, the answer, please.

THE COURT: There was -- if there was an answer the court did the not hear it. If there was an answer it will be totally stricken and disregarded.

BY MR. KAY:

Q Mr. Kleberg, did you smoke any of the marijuana that Randolph Ayersman supplied to you?

A Yes, I did.

Q And was it marijuana, in your opinion?

A Oh, yes.

Q Did you ever smoke marijuana at Philip Manglitz's house?

A Yes, I did.

Q Did he see you?

A yes.

Q Which house?

A The play house, the smaller house.

Q What street was that on?

*** Page 600-603 ***

AFTERNOON SESSION

(The following proceedings were had in open court out of the presence and hearing of the jury:)

THE COURT: It was brought to my attention on the record that this witness blurted out something about the defendant having been arrested.

MR. AHLERS: Yes.

THE COURT: I did not hear that but I am going to hear it right now.

(Thereupon, the reporter read the following questions and answers:

"Question: Did he say thing about the marijuana business?

ANSWER: Yes.

"QUESTION: What did he say about it?

ANSWER: That lie had been in the business at one

"QUESTION: What else did he tell you about the marijuana business?

ANSWER: Well, he had been arrested down on the Texas-Mexican --

THE COURT: You still move for a mistrial? I had not heard that portion answer. In any event, I will deny your motion for a mistrial and I will give the jury a cautionary instruction.

MR. KAY: I just wanted to mention as well, I am not sure counsel requested a limiting instruction also about that testimony.

THE COURT: They didn't ask for a limiting instruction. They simply moved for a mistrial.

MR. KAY: Perhaps we should have a limiting instruction that it runs to knowledge, Your Honor.

THE COURT: I heard enough.

MR. AHLERS: Could I address an unrelated issue?

THE COURT: Sure.

MR. AHLERS: Your Honor, I am scheduled to appear as co-counsel in a multiply defendant case before Judge Messette on Monday afternoon. I anticipate Mr. Carter will be a witness being handled by Mr. Hoffinger. I would be

asking leave to be excused to go to Judge Messette's court room Monday afternoon.

THE COURT: Mr. Hoffinger will appear alone.

MR. AHLERS: Yes.

THE COURT: That is satisfactory.

MR. AHLERS: I just want to bring that to the court's attention.

MR. HOFFINGER: Your Honor, we don't know who is going to be on Monday, perhaps we can ask Mr., we are making an assumption that Mr. Carter will be on Monday. Perhaps Mr. Kay will tell you who will be on Monday so we can work around it.

THE COURT: You are concerned as to which of the two defense counsel will do the cross-examination.

MR. HOFFINGER: Yes. I am afraid if it is 3:00 o'clock and he leave perhaps a witness who lie is prepared to cross examine and I am not.

THE COURT: What witness will we have Monday afternoon?

MR. KAY: Assuming we finish Mr. Kleberg this afternoon we are almost finished with him. If Mr. Ahlers thinks can finish with Mr. Kleberg this afternoon .

THE COURT: Who will your next witness be?

MR. KAY: It could be Cooper. He is unavailable Monday afternoon.

THE COURT: Who will be your witnesses Monday afternoon.

MR. KAY: It could have been Duncan Forest, Your Honor, and it could be Ted Marshall.

THE COURT: Well, we will call a witness, if necessary out of order so as to accommodate defense counsel.

MR. KAY: Which will that be?

THE COURT: You gentlemen can get together and accommodate each other.

MR. KAY: I will be glad to, Your Honor.

(The following proceedings were had in open court in the presence and hearing of the jury:)

DANA KLEBERG, resumed the stand.

THE COURT: Good afternoon, ladies and gentlemen.

(Thereupon, there was a chorus of, "Good afternoon.")

THE COURT: Now the jury may remember the testimony of this witness about a conversation he had with Mr. Manglitz aboard a plane on route from Acapulco back to the United States. At one point, you may recall, Mr. Kay made the following inquiry: And what else did he say? I sustained an objection.

Now do members of the jury recall what this witness's answer was before I sustained the objection? Well, that answer was totally inappropriate. It will be totally disregarded. The witness should not have answered in view of the fact an objection was pending.

I will repeat, the question was improper, the answer was not only improper it was prejudicial and shall be disregarded in toto as though you had never heard it.

With that, you may proceed.

MR. KAY: Thank you, Your Honor.

I would like to go ahead and play the next tape, Your Honor, if we could, that would be tape --

THE COURT: I will instruct the witness again if you can understand the court's direction.

*** Page 1088-1092 ***

Q And he indicated to you that wasn't necessary, is that correct?

A Correct.

MR. AHLERS: No other questions.

THE COURT: Redirect examination.

MR. KAY: Yes, Your Honor. May we approach first though?

THE COURT: Yes.

(The following proceedings were had at the Bench the hearing of the jury:)

MR. KAY: Your Honor, I have been told by several people in the courtroom that he never said that the hundred thousand dollars was drug money. That this witness did not say that the hundred thousand dollars was drug money, that he didn't get that answer out.

THE COURT: You will have an opportunity for redirect.

MR. KAY: Thank you very much, Your Honor. I can

ask him if it was drug money?

THE COURT: Any redirect is within the scope of cross. If the question is permissible you may ask it. You want to make a proffer at this point?

MR. KAY: I just wanted to ask him if that one hundred thousand dollars was drug money, Your Honor. I wanted to ask it on direct, and I think I was precluded from asking, it before he question.

THE COURT: He just testified the purchase price was $140,000.00.

MR. KAY: The other hundred thousand, the hundred thousand dollars that he gave.

THE COURT: You may inquire. I don't know what the question will be but I will listen, if it is relevant and permissible I will allow you to go ahead.

Go ahead.

(The following proceedings were had in open court in the presence and hearing of the jury:)

REDIRECT EXAMINATION

BY MR. KAY:

Q Mr. Lee, when I asked you questions before you testified about Pindell School Road and Mr. Manglitz gave you cash, do you recall that?

A Yes.

Q I asked you if he had given you cash prior to that, do you recall that?

A You mean if I had given him cash.

Q I am sorry, yes, you are right, whether you had given him cash?

A Correct.

Q And how much did you give him before that?

A I thought I gave him a hundred thousand dollars.

Q And the hundred thousand dollars, what was the source of that money?

A The source of the money was drugs.

Q Did someone ask you for that money?

A Yes.

Q Who asked you for that money?

MR. AHLERS: Objection.

COURT: Overruled.

Q Who asked you for that money, Mr. Lee?

A My friend Mr. Swatta asked me for the money.

Q Who did you give it to?

A I gave it to Mr. Manglitz.

Q Without telling us about Mr. Manglitz, what business were you in with Mr. Swatta?

A The drug business.

Q Where was Mr. Swatta when he told you he needed the money?

A Mr. Swatta was in Miami, Florida.

Q What did he need it for?

A For a drug deal.

Q And who did you give the money to?

A I gave the money to Mr. Manglitz.

MR. AHLERS: Objection. May we approach, Your Honor.

THE COURT: Yes.

(The following proceedings were had at the Bench out of the hearing of the jury:)

MR. AHLERS: Judge, I think Mr. Kay has now intentionally violated this order. He set up the following factual scenario for the jury: That Mr. Manglitz received money from one person and gave it to another to participate in a drug deal. Precisely the opposite of what the court had previously ruled, both you and our prior judge, the most that could have come in. Your Honor, was very clear this was a 404 (b) limitation here. The only reason certain evidence could be received went to the issue of knowledge or intent, not to create prejudice in the minds of the jury that he and this man was involved in a prior bad act.

THE COURT: What do you say about violation of Judge Smalkin's order?

MR. KAY: This goes directly to knowledge and intent, Your Honor, because if the money was bundled in the same way he received it from Dana Kleberg and Ayersman, he testified he had received it from Dana Kleberg, and Randy Ayersman testified that they gave cash to Mr. Manglitz, it was bundled in this exact same fashion that Mr. Manglitz received it from James Lee in the 1980's. It goes directly to knowledge, Your Honor.

THE COURT: I didn't get that detailed testimony I

am sure that counsel of defendant would certainly vigorously object if I allow it to continue any further with respect to the way it was bagged and so on. I am going to allow the record to stand and give the jury a limiting instruction.

MR. AHLERS: Thank you.

(The following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Ladies and gentlemen, the testimony you have heard from the witness about drug trafficking is not to be considered by you as evidence with respect to Mr. Manglitz's character, propensity, nor is it to be considered as evidence that Mr. Manglitz committed the offenses alleged in this indictment. It may be considered by you only for the limited purpose of showing intent or knowledge.

And with that you may proceed.

MR. KAY: No further questions, Your Honor.

THE COURT: Any recross?

MR. AHLERS: No, thank you, Your Honor.

THE COURT: That will complete your testimony, sir. Please step down.

Proceed with your next witness, please.

MR. KAY: Thank you very much.

At this time of the government would call Robert Vivian as the next witness.

Q Were these thousand dollar denominations were they bundled in any particular way?

A Usually rubber bands or tape.

Q After it was bundled did you deliver it to Dana Kleberg?

A I would usually meet him somewhere or delivery it to him, yes.

Q Was it contained in anything in particular, did you ever put it into anything?

A Sometimes paper bags, plastic bags, duffel bags.

Q When you say paper bags, did you use brown paper grocery bags?

MR. AHLERS: Objection. Leading.

THE COURT: Frankly, my attention was distracted for just a moment.

MR. KAY: I will rephrase the question, Your Honor.

THE COURT: I will sustain the objection and counsel can rephrase the question.

Q Mr. Vivian, can you describe a little more accurately the type of bag that you would deliver money to Mr. Kleberg?

MR. AHLERS: Objection. It was asked and answered.

THE COURT: I will overrule the objection. Proceed please.

*** Page 1702 - 1712 ***

Mr. Ahlers says that Philip Manglitz never took cash. Never took these people. Well, there is one person that Mr. Ahlers did not mention in his argument, one very important person, that person is not a cooperator, he does not have a plea agreement, he is not a criminal, he is Philip Manglitz's friend. Philip Manglitz's friend. Philip Manglitz loaned him money, that is, Duncan Forest. What is Duncan Forest's motive to lie? Why would Duncan Forest come here and make something up. Why would he do that? He is not a cooperator. He has got no motive to lie. He is the defendant's friend. And what did he say? Philip Manglitz gave him cash, ladies and gentlemen. Philip Manglitz gave him cash, gave him $25,000.00 cash in a brown paper bag bundled, thousand dollar bundles. Why would he make it up?

Significance of the bag? Mr. Ahlers wants to know what is the big mystery, why the bag, why the brown paper bag? It is just a trick. He says, well, we don't have the bag that Philip Manglitz took the cash in. We don't have the bags and we don't have the cash. We don't have them. What are we going to do, the bag was merely something to illustrate what these witnesses were talking about. I had them sign it Big deal. To show they were all talking about the a thing and that is important, ladies and gentlemen , they are all talking about the same thing. It lends credibility. It shows that they are telling the truth and, ladies and gentlemen, that bag in

evidence. It is Government's Exhibit Number 69. Take a close look at that bag. It is not a trick. Look at the signatures on the bag. Look at the last signature on that bag. Duncan Forest signed that bag, ladies and gentlemen. Is that a trick? Where is the trick there? How did we trick Duncan Forest into coming here and telling you that Philip Manglitz gave cash to Duncan Forest in Austin, Texas. How did we trick him into that? That is not a trick. It is not a trick at all. It is the truth, ladies and gentlemen. It is common sense.

The tapes Mr. Ahlers said Manglitz didn't take the cash. Listen to the tapes. He didn't take the cash. Of course he didn't take the cash but, he agreed to, ladies and gentlemen. Listen to the tapes. We encourage you to listen to the tapes. Philip Manglitz agreed to take the money. He said he was going to take it. He said he knew it was cash and he said he was going to take it. We will make up legal documents, that is it, we will have some legal documents. It is on the tapes. I talked to Ron Carter. Yeah, we will put it in the bank account in little bits at a time. We will get it in there. We will sneak it in. It is on the tapes, ladies and gentlemen. He was going to take that cash. But, what happened? What happened on February Both, 1995? I will tell you what happened, you heard what happened, the witnesses told you what happened, Philip Manglitz met with Dana Kleberg in that parking lot. Philip Manglitz spotted a van, surveillance van, he got suspicious. He said, let's get out of here. Let's move. Let's go somewhere else. Let's go to my lawyer's

office. Let's go to the parking lot over there. And he did. He moved it, ladies and gentlemen. Why? Because Philip Manglitz was suspicious. Philip Manglitz's suspicions were aroused when he saw that van. Let's get out of here and they left. Something is wrong. Something is wrong.

What happened when they got to Mr. Cooper's office? Mr. Jack Cooper's office, what happened when they got there in the parking lot? Philip Manglitz looks at the cash. Let's see it. Let's look at that cash. Let's look at it. Big bills, little bills. He doesn't say, let's see the date on the check. He doesn't say that. Little bills, big bills. It is on the tape, ladies and gentlemen. He saw the money. He knew it was cash and he was ready to take it. Who knows? Only one person knows. Only one person in the world who knows and that is Philip Manglitz, he knows. I don't know.

MR. AHLERS: Objection, Your Honor.

THE COURT: Overruled.

MR. AHLERS: May we approach on that, Your Honor?

THE COURT: No.

MR. KAY: Something went wrong, ladies and gentlemen, something went wrong because you could hear on that tape something goes wrong. He doesn't know what to do. He doesn't know what to do but, he is not going to take that cash. I don't know what went 'wrong. None of us do. What happened? Maybe he suspected that Dana Kleberg was wired. Maybe that is what happened. Maybe he suspected

Ron Carter was wired. He may have suspected that Ron Carter was wearing a wire. Maybe he thought Ron Carter was wearing the tape recorder because he changed. Something happened when he got inside. He was ready to take that cash outside. When he gets inside something is wrong, something changes in his mind, something changes in his demeanor, that is what Dana Kleberg said, look at the change in his demeanor, listen to the tape, you can hear it, you don't have to be there. What went wrong? Carter came in. Maybe Carter. Maybe Carter. Something is wrong here. I just don't feel right. I am calling this off. I am calling it off. I am not taking the cash. Cash? I didn't know it was cash. I thought it was a check. Baloney. That is absolute baloney, ladies and gentlemen. That is why he didn't take the cash. Listen to the tape. He knew it was cash. Cash. Baloney.

Mr. Ahlers makes a big deal about the fact that Carter signed the documents at settlement. Big secret? No big secret. Someone had to sign the papers at settlement. What did Carter tell you? Why was Carter at the settlement? Because Manglitz told him to be there, that is why. Philip Manglitz said to go and sign the papers. Philip Manglitz told him to go. Philip Manglitz told him to sign the papers. What is important? Smoking mirrors, ladies and gentlemen, as well as diversion. Who is at the settlement? Carter is at the settlement. Manglitz isn't at the settlement. It is a diversion. Where is the real action here. Where is the action on these deals? At the settlement? Pay attention, ladies and

gentlemen, common sense. Where is the action on these deals? The action on the deals is the contract. The action on the deals is when Philip Manglitz signs the contract with Randy Ayersman, signs the contract with Dana Kleberg, meets with both of those guys separately and says, yeah, I will take that money. I will take that cash and then he takes it, he takes the cash. That don't happen at settlement. Those contracts are not signed at the settlement. That is why Ron Carter went to the settlement. Phil Manqlitz didn't have to be there.

Philip Manglitz is a smart man, ladies and Gentlemen. Don't doubt it for a minute.

THE COURT: I do want to interrupt for one moment. There was an objection the court overruled. And, I, at this juncture, after completion of this phase of the government's argument in rebuttal, Mr. Kay has argued that he, Mr. Manglitz, knows that. If there is any suggestion in that argument that you should draw any inference from the failure of Mr. Manglitz to testify that would be totally improper. I did not get that suggestion but possibly you could. There is no obligation on the part of Mr. Manglitz to testify, as I will instruct you, and this is terribly important, no inference whatsoever may be drawn from the fact that Mr. Manglitz did not take the stand and testify. None whatsoever. He has no burden whatsoever of presenting any testimony. The burden is totally on the part of the government of proving each and essential element of the case, beyond a reasonable doubt.

And I suspect was that the reason you wanted to approach the Bench?

MR. AHLERS: It was, Your Honor. Thank you.

THE COURT: I did this sua sponte because I wanted to have this phase of the argument completed.

MR. AHLERS: Thank you, Your Honor.

THE COURT: You may proceed.

MR. KAY: Thank you very much, Your Honor.

I did not mean to suggest that in any way, ladies and gentlemen. The government's burden here is a very heavy one, extremely heavy. The government must prove its case beyond a reasonable doubt but, we accept that burden. We accept it everyday. We come in here to prove things to you, beyond a reasonable doubt, with evidence. With evidence. And that is what I ask you to do, ladies and gentlemen, look at the evidence. Use your common sense and look at the evidence. And we have met that burden. I don't mean to suggest anything else to you about the defendant not taking the stand.

MR. AHLERS: Objection.

THE COURT: Would you, please, I am sorry , repeat your last few sentences.

MR. KAY: I am was just carrying on, Your Honor.

THE COURT: Repeat what you just said. I don't want to emphasize it but I have an objection.

MR. KAY: I don't want to suggest anything to you about Mr. Manglitz not taking the stand. I did not suggest

that and I will not suggest that to you.

THE COURT: You are objecting?

MR. AHLERS: Your Honor, I would approach the Bench typically, at this time, Your Honor.

THE COURT: There is no reason to.

MR. AHLERS: Very well, Your Honor. I don't think the prosecutor restated it correctly.

THE COURT: Well, the court has advised the jury in the most positive way, I can't be more positive about considering it improper any suggestion by counsel for the government with respect to the defendant, Mr. Manglitz, not having taken the stand. I will not repeat, at the present time, what I have said. I will, however, repeat it in the instructions I give you.

MR. KAY: Thank you very much, Your Honor.

Mr. Ahlers asked: Why not a brown paper bag at Mr. Cooper's office? Remember that? Again, he thought it was a big deal we didn't have a brown bag at Cooper's office. When Kleberg was wired. It was in a canvas bag. You remember that. Well, listen to the tape. Listen carefully to the tape. Does Philip Manglitz on the tape say, hey, what is with the bag? What is with the bag? How come you don't have a brown paper bag this time? Did he say that? No. He says, let's look at the money. He is not interested in the bag. He wants to see the money. He wants to see the cash. He wants to see the bills. List to the tape. There is no question about it. Big bills, little bills, nothing about a bag. The bag is unimportant. Smoking mirrors, ladies and gentlemen.

Keep your eye on what is important, the money. It is cash and Philip Manglitz is ready to take it.

Why at Cooper's office? Mr. Ahlers want to know why meet at the lawyer's office? Why go to Mr. Cooper's office? Why? Why not? Cooper is not there. No one said Cooper was there. Cooper wasn't even there.

MR. AHLERS: Objection.

THE COURT: Overruled.

MR. KAY: It was a room. It was an office. It was a place to conduct a deal. A place to conduct a transaction in a room closed off. Nothing suspicious about that. It makes sense. It is common sense. He has got it available to him. He wants to use it. He set it up beforehand. He is going to go to Cooper's office and do this big deal. It is not important.

And, also, don't forget the surveillance, the fact, as the testimony came out in this trial, Manglitz, saw the surveillance. They had to get out of there. They had to go somewhere. They went to Cooper's office. It is logical. It is common sense, ladies and gentlemen. Nothing suspicious about that.

Next Mr. Ahlers wants to know Philip Manglitz's calls his attorney. It is on the tape. Calls on his attorney about money laundering. Why would he do that? Why would he do that? It is on the tape. Listen to it. Listen very, very carefully to it. What does he say? I called my attorney. I asked him what do I do about taking cash. He says, I don't. know. Call your accountant. See if there is any reporting

requirements. He called the accountant. What happened there? I asked Renee, what happens if I take cash? Just book it. What is the important detail that is missing there, ladies and gentlemen? What is missing? Did he tell them it was drug money? Did he tell, Mr. Cooper, his attorney it was drug money? Did he tell Renee it was drug money? Oops, left that out. Skipped his mind. You got cash. Book it. Listen to the tapes. It is on the tapes, ladies and gentlemen. I will move on. He doesn't say, what do I do if I take drug cash. It is not on there. It is important, ladies and gentlemen, it is critical, it is critical to the case Philip Manglitz knew it was drug money. We went over it at length before. Philip Manglitz knew it was money. He took the cash. He knew it was drug money, but he didn't tell that to the lawyer. He didn't tell that to the accountant. It is on the tapes.

Where is the cash? Well, Mr. Ahlers wants to know where is the cash? So much cash. How come they didn't find the cash? Well, where is the cash? Duncan Forest got some of it. Mr. Ahlers didn't tell you about that. Didn't even discuss it. Didn't even mention Duncan Forest's name. Why? Because there is the answer to the question, Duncan Forest got cash.

MR. AHLERS: Objection.

MR. KAY: Duncan Forest got cash. Where is the rest of it? Who knows, ladies and gentlemen, who knows. Again, common sense, common sense. What happens, what happens in February of 1995 when Philip Manglitz's house was

searched, when Philip Manglitz --

MR. AHLERS: Objection.

T HE COURT: Overruled.

MR. KAY: What happened at that point? What did Philip Manglitz know? It is on the tapes, ladies and gentlemen. It is on those tapes. Every single one of those tapes. Philip Manglitz is on there. What is he talking about? Big secret. Randy Ayersman had been arrested. Dana Kleberg had been caught. They were having negotiations with the government. They are talking to the U.S. Attorney's office. They are talking to agents. They are talking about everybody. Philip Manglitz knows this. What is he going to do? You heard what Agent Forletta told you on the stand as an expert witness what happens when people know that someone in their group has been arrested, get rid of it, conceal it.

MR. AHLERS: Objection.

THE COURT: Overruled.

MR. KAY: It is gone, ladies and gentlemen. That is, why we don't have it. It is gone.

Resubdivision of lot 31, again, Mr. Ahlers wants to know what is the big deal about that? What is the big deal about the resubdivision? Well, look at the price, ladies and gentlemen. Look at the price of the darn thing. It was listed, or selling, listed or asking price was $448,000.00 for those three lots. $448,000.00. And look at the deed. It is in evidence. Look at the deed. See what it sold for. Randy Ayersman both those three lots, one big lot, $448,000.00, and

what he did he pay? $54,000.00. $54,000.00 for $448,000.00 worth of real estate. Why is that important? Why are all these people not in jail Mr. Ahlers wants to know.